

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

-----: :
SONY MUSIC ENTERTAINMENT, et al., :
Plaintiffs, :
-vs- : Case No. 1:18-cv-950
COX COMMUNICATIONS, INC., et al., :
Defendants. :
-----: :

VOLUME 4 (P.M. Portion)

TRIAL TRANSCRIPT

December 5, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 APPEARANCES:

2 FOR THE PLAINTIFFS:

MATTHEW J. OPPENHEIM, ESQ.
SCOTT A. ZEBRAK, ESQ.
JEFFREY M. GOULD, ESQ.
MICHAEL J. DRUCKMAN, ESQ.
ANDREW L. GUERRA, ESQ.
LUCY G. NOYOLA, ESQ.
JIA RYU, ESQ.
Oppenheim + Zebrak, LLP
4530 Wisconsin Avenue, N.W.
5th Floor
Washington, D.C. 20015

8 FOR THE DEFENDANTS:

9 THOMAS M. BUCHANAN, ESQ.
10 Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006-3817
and
11 SEAN R. ANDERSON, ESQ.
MICHAEL S. ELKIN, ESQ.
12 THOMAS P. LANE, ESQ.
CESIE C. ALVAREZ, ESQ.
13 Winston & Strawn LLP
200 Park Avenue
14 New York, NY 10166-4193
and
15 JENNIFER A. GOLINVEAUX, ESQ.
THOMAS J. KEARNEY, ESQ.
16 Winston & Strawn LLP
101 California Street, 35th Floor
17 San Francisco, CA 94111-5840
and
18 MICHAEL L. BRODY, ESQ.
Winston & Strawn LLP
19 35 West Wacker Drive
Chicago, IL 60601
and
20 DIANA HUGHES LEIDEN, ESQ.
Winston & Strawn LLP
21 333 South Grand Avenue
Suite 3800
22 Los Angeles, CA 90071
23
24
25

INDEXWITNESSEXAMINATIONPAGE

GEORGE P. McCABE

DIRECT 810

CROSS 816

REDIRECT 865

LINDA TRICKEY

DIRECT 877

1 A F T E R N O O N S E S S I O N

2 NOTE: The December 2, 2019, afternoon portion of the
3 case begins in the absence of the jury as follows:

4 JURY OUT

5 THE COURT: All right. Ready for our jury?

6 Okay. Joe, let's get our jury, please.

7 NOTE: At this point, the jury returns to the
8 courtroom; whereupon, the case continues as follows:

9 JURY IN

02:04:46 10 THE COURT: All right. Please have a seat.

11 GEORGE P. McCABE, PH.D., PLAINTIFFS' WITNESS,

12 PREVIOUSLY SWORN, RESUMED

13 THE COURT: All right. Let's continue, please.

14 MR. ZEBRAK: Thank you, Your Honor.

15 DIRECT EXAMINATION (Cont'd.)

16 BY MR. ZEBRAK:

17 Q. Good afternoon, Dr. McCabe. Right before we broke for
18 lunch, you were in -- we were discussing your assignment to the
19 repeat infringer analysis, and I believe we were just about to
02:05:28 20 jump into this slide. Would you please explain to the jury
21 what's being depicted in this slide?

22 A. Yes. So for this slide, I classified the, the 57,600
23 subscribers, which I'm calling the frame. I classified them as
24 residential subscribers or business subscribers. So there were
25 54,732 residential subscribers, and there were 2,868 business

1 subscribers.

2 The pie chart depicts that -- those numbers expressed
3 as percents. So 95 percent of the subscribers were
4 residential, and 5 percent were business.

5 Q. And, Dr. McCabe, what is the source of the data records
6 you used to assess the breakdown of the Cox subscribers who
7 were the subject of MarkMonitor's notices?

8 A. Could we go back to the slide that has the datasets on it?

9 Q. Sure. That would be -- please let me know when I'm there.

02:06:46 10 A. Yeah, that's fine. So it's along the top. So it's Cox
11 data, and it's the third file, which is -- in this display is
12 called billing information. So billing information is the
13 connector for the defining residential versus business.

14 Q. I'm going to, if it's okay, bring us back to the slide we
15 were just on. Is there anything else about this slide that --

16 A. I think that's it. 95 percent versus 5 percent, yeah.

17 Q. Okay. And would you please explain to the jury what's
18 being depicted in this slide with respect to your repeat
19 offender analysis?

02:07:48 20 A. Yes. So here I looked at the -- excuse me -- I looked at
21 the, the source of the, of the notice. So the notices that I
22 have recorded from, as infringers -- I'm sorry -- the notices
23 from going back to MarkMonitor, for those rights holders, my
24 understanding is they're the plaintiffs in this suit, but the
25 Cox file also contains notices from other rights holders.

1 So basically here what I did was look again at
2 subscribers, so it's a subscriber analysis, and
3 17,729 subscribers had notices from other rights holders.

4 So, again, 17,729 out of 57,600, that's depicted in
5 the pie chart as 30.8 percent. So 30.8 percent of the
6 subscribers had notices from other rights holders.

7 Q. So out of the 57,600 Cox subscribers reported in
8 MarkMonitor's notices, a little less than a third of them were
9 also the subject of notices that led to tickets as reported by
02:09:26 10 the rights holders? Is that what you're saying?

11 A. That's correct.

12 Q. Okay. And is this also based on Cox's records, the ticket
13 data that you described earlier?

14 A. That's correct.

15 Q. Okay. Looking at the next slide you have here, would you
16 explain to the jury what the purpose of this slide is?

17 A. Yeah. The purpose is to depict the analysis that I did
18 related to claims -- or notices, sorry, notices before the
19 claim period. So if you look at the timeline on the bottom in
02:10:06 20 yellow there, the bar with arrows at the end, that's the
21 definition of a claim period, February 1, 2013, to November 26,
22 2014, with a caveat that there's a different start time for the
23 one plaintiff.

24 Superimposed on that in the gray is the time frame
25 for the Cox ticket data. So for the Cox ticket data, that

1 spans the years 2012, '13, and '14. So it overlaps -- or the
2 claims period is a subset of that time frame.

3 So if we look at the, the notices before the
4 beginning of the claim period, that is, before February 1,
5 2013, there were 13,441 subscribers who had one or more tickets
6 in that before claim period, the period to the, the left of the
7 center cut in the slide.

8 Q. Dr. McCabe, I'd like to ask you a question that contrasts
9 this with the works in suit analysis, and looking back at the,
02:11:33 10 if you wouldn't mind going back to the original slide, the
11 works in suit analysis was a third or later notice for a
12 subscriber in the claim period; is that correct?

13 A. That's correct.

14 Q. Okay. But then looking -- and the repeat infringer
15 analysis is the who, it's the people; is that correct?

16 A. The subscribers, yes.

17 Q. Okay. Well -- and then -- oops.

18 And so this -- is there anything else about this
19 slide that you'd like to explain?

02:12:18 20 A. No. But just as, as you mentioned or as I mentioned, it
21 depicts the contrast between the claims period and the larger
22 period of time covered by the Cox data that I used for the
23 repeat infringer analysis.

24 Q. So the 23.3 percent, is it correct that Cox received
25 notices from them both during the claim period and prior to the

1 period? Is that essentially what this slide is showing?

2 MR. BUCHANAN: Asked and answered and leading.

3 THE COURT: All right. I'll allow the question.

4 BY MR. ZEBRAK:

5 Q. Would you like me to repeat the question?

6 THE COURT: Well, just ask him: What does this data
7 depict?

8 MR. ZEBRAK: Sure.

9 THE WITNESS: So, yes. It's -- again, it's a count
02:13:12 10 of subscribers. The frame is the 57,600 subscribers reported
11 by MarkMonitor. Of those 57,600, 13,441 had tickets before the
12 claim period, so to the left of this time frame. That 13,441
13 represents 23.3 percent of the 57,600, and that's what's
14 depicted in the, in the pie chart there, the 23.3 percent.

15 BY MR. ZEBRAK:

16 Q. And whose records is this data based on?

17 A. It's based on the ticket data from Cox.

18 Q. Okay. And are you familiar with someone by the name of
19 Christian Tregillis?

02:14:19 20 A. Yes, I am.

21 MR. BUCHANAN: Objection, Your Honor. This is an
22 expert.

23 THE COURT: Well, I think we've got a preview of a
24 slide with his name on it, but I don't know what that --

25 MR. BUCHANAN: He hasn't testified yet, so -- I'm

1 anticipating it would be rebuttal. And so you're going to ask
2 him questions about his report when he hasn't testified yet.

3 THE COURT: Okay. Overruled. I think that's proper.
4 Mr. Tregillis will have an opportunity to address issues.
5 Well, let's see where you're going with this.

6 MR. ZEBRAK: Yeah, they had received the slides, and
7 I hadn't heard of an objection, but I'm happy to proceed.

8 BY MR. ZEBRAK:

9 Q. Are you familiar with who Christian Tregillis is?

02:15:06 10 A. Yes.

11 THE COURT: Is he going to critique his report at
12 this stage, or is this something else?

13 MR. ZEBRAK: No, Your Honor.

14 THE COURT: Okay. Go ahead.

15 MR. ZEBRAK: May we have a quick sidebar?

16 THE COURT: Yeah.

17 MR. ZEBRAK: Thank you.

18 NOTE: A sidebar discussion is had between the Court
19 and counsel out of the hearing of the jury as follows:

02:15:35 20 AT SIDEBAR

21 THE COURT: All right. So we don't rebut somebody's
22 testimony based on the report. We wait until they testify, and
23 then we report -- rebut their testimony if you feel it's
24 proper.

25 MR. ZEBRAK: Yes, sir.

1 THE COURT: So what have you got here?

2 MR. ZEBRAK: Well, we thought it would just be useful
3 for the jury to understand that Mr. Tregillis agrees that over
4 95 percent of the works in suit match to infringement notices.
5 It's really just showing -- you know, it's sort of
6 provisionally indicating that Mr. Tregillis agrees, but, quite
7 frankly, I mean, if Your Honor wants to do that, we can --

8 THE COURT: Yeah, let's move on beyond that. You can
9 cross-examine Mr. Tregillis on that.

02:16:20 10 MR. ZEBRAK: Yeah. We just thought it would be
11 useful for the jury, but we can move on.

12 THE COURT: Okay.

13 MR. ZEBRAK: Thank you.

14 THE COURT: All right. Thank you.

15 NOTE: The sidebar discussion is concluded;
16 whereupon, the case continues before the jury as follows:

17 BEFORE THE JURY

18 THE COURT: All right. Please go ahead.

19 MR. ZEBRAK: We pass the witness at this point, Your
02:16:59 20 Honor.

21 THE COURT: All right.

22 MR. ZEBRAK: Thank you.

23 THE COURT: Cross-examination, Mr. Buchanan?

24 MR. BUCHANAN: Yes, please, Your Honor.

25 CROSS-EXAMINATION

1 BY MR. BUCHANAN:

2 Q. Good afternoon, Dr. McCabe. How are you?

3 A. Fine.

4 Q. I promise there will be no spreadsheets here for this
5 examination.

6 So you, as I understand it, have been associated with
7 Purdue University for 50 years; is that right?

8 A. That's correct.

9 Q. Okay. And from 2004 to 2018, you were a dean of a
02:17:36 10 department; is that right?

11 A. I was an associate dean for the College of Science.

12 Q. And you also taught courses at the same time?

13 A. I had a reduced teaching load.

14 Q. Okay. And you spent, I think, 75 percent of your time on
15 administrative work related to being a dean?

16 A. That's correct.

17 Q. And then other time you were teaching as well a course a
18 semester?

19 A. I was primarily doing research, but, yeah, I did --

02:18:03 20 Q. Okay. So is it fair to say that over the last ten years,
21 you've done very little expert testimonial work?

22 A. Over the last?

23 Q. Ten years.

24 A. In court or related matters, I'm not sure. I have --

25 Q. It would be a very small amount of work in the last

1 ten years that related to expert work, right?

2 A. Probably the same amount during my 50 years. I think it's
3 been a small amount throughout my career.

4 MR. BUCHANAN: Can we give him the binder?

5 BY MR. BUCHANAN:

6 Q. So I'd ask you to take a look at your deposition
7 testimony, page 81.

8 Can we pull that up, transcript 81, lines 3 through
9 8?

02:19:07 10 And maybe this would help you refresh your
11 recollection.

12 MR. ZEBRAK: Excuse me, Your Honor.

13 THE COURT: Yeah.

14 MR. ZEBRAK: This is --

15 THE COURT: Take the -- take it down. Ask him --
16 let's not put it up on the screen.

17 MR. BUCHANAN: Okay.

18 THE COURT: Just ask him whether that refreshes his
19 recollection.

02:19:23 20 MR. BUCHANAN: Okay.

21 THE COURT: Ask him to read the section that you want
22 him to read.

23 MR. BUCHANAN: Okay.

24 THE COURT: Everybody does refreshing recollection
25 and past recollection recorded a little differently, so this is

1 the way I would like to do it, Mr. Buchanan. So if you'd just
2 identify the segment where you're looking and see whether it
3 refreshes his recollection.

4 BY MR. BUCHANAN:

5 Q. Okay. So if you look at your deposition transcript, do
6 you see that lines 3 through 8 on page 81?

7 A. Page 81, lines 3 through 8?

8 Q. Right.

9 A. I'm not sure of the context of the question that I can get
02:20:13 10 from those -- I'm speaking --

11 Q. If you look at, start with line 21: Okay. How about over
12 the last ten years?

13 MR. ZEBRAK: Excuse me, Your Honor, Mr. Buchanan
14 understands the objection.

15 THE COURT: No, he's focusing on a, on a specific
16 sentence.

17 MR. BUCHANAN: That's -- I've given him the line.

18 THE COURT: Yeah, that's proper.

19 MR. ZEBRAK: Thank you, Your Honor.

02:20:39 20 THE WITNESS: I see. So if it's strictly speaking as
21 an expert witness, I have done very -- relatively little of
22 that, I'd say a dozen times or so over my career in court as an
23 expert witness. I don't know if you count depositions or --

24 BY MR. BUCHANAN:

25 Q. No, the, the question I had was in the last ten years, how

1 much -- isn't it true that you've done a very small amount of
2 work as an expert witness?

3 A. Yes. I have done a small amount of work.

4 Q. Okay. Thank you.

5 And I know you -- and on your direct, you mentioned
6 some of the work you had done as an expert witness, and I think
7 you mentioned some equal employment cases; isn't that right?

8 A. That's correct.

9 Q. Okay. Wasn't the last time you testified in court in
02:21:29 10 1996? It was a case down in South Carolina? You testified for
11 the Medical College of Charleston in a discrimination case?

12 A. I recall that case. I believe I testified in Kansas on a
13 food -- a pet food recall case. I'm not sure that the issue
14 there was whether or not -- I can't remember the details, but I
15 did testify before a judge, not before a jury, and it was a
16 matter of whether there should be a separate trial in Kansas
17 versus the Kansas issues combined with a larger group of
18 plaintiffs.

19 So I don't know if that's called expert witness
02:22:26 20 testimony or not, but that was the last time I spoke in a court
21 with a judge.

22 Q. Okay. And you testified, I think, in some other
23 discrimination cases in the '70s and '80s?

24 A. Yes.

25 Q. Okay. Isn't that sort of the last time you actually

1 testified in court, in those cases for General Motors and
2 Michigan State University in class action discrimination cases?

3 A. That would have been most of my in-court testimony, yes.

4 Q. And you were representing Michigan State, General Motors,
5 the State of South Carolina against the plaintiffs, right?

6 A. I'm not sure about the word "represented," but I was
7 employed by them.

8 Q. Okay. And I think you admitted or testified on direct
9 that you have never testified prior to this case in a case
02:23:22 10 involving copyright infringement or peer-to-peer networks;
11 isn't that right?

12 A. That's correct.

13 Q. Okay. You're not an expert in any of those areas; is that
14 right?

15 A. I'm not an expert in those areas.

16 Q. Other than this case, you've never been retained by a
17 music company to testify; is that correct?

18 A. By a music company?

19 Q. Like one of the plaintiffs in this case, a recording
02:23:46 20 company, recording label?

21 A. To testify in court, no.

22 Q. Okay. So you have been retained before by the plaintiffs'
23 counsel, have you not?

24 A. That's correct.

25 Q. And that was a case involving analyzing inventory of a dog

1 books dog store and tracking the inventory and books going in
2 and out, right?

3 A. That's correct.

4 Q. Okay. And how much did you get paid in that case; do you
5 recall?

6 A. I don't recall. It was a while ago. It was relatively a
7 short, very specific task that I was asked to do there.

8 Q. And how much have you been paid in this case? I know
9 you -- you gave your hourly rate, and you said the hours.

02:24:34 10 What's the total, about 100,000?

11 A. That would be correct in round numbers.

12 Q. And you've been sitting in the courtroom for the last two
13 or three days, is that right, watching this?

14 A. That's correct.

15 Q. Okay. Have you been paid for that?

16 A. Yes.

17 Q. Okay.

18 A. I haven't been paid yet for that. I assume I will be.

19 Q. I hope you bill. Okay.

02:24:54 20 So you're not an expert on, like, businesses and how
21 they operate and procedures of businesses, are you?

22 A. I am not.

23 Q. And I think you've actually acknowledged to me in your
24 deposition that you've never taken a business course; is that
25 correct?

1 A. That's correct.

2 Q. Okay. And your report, I think there were four reports,
3 were there not, that you wrote?

4 A. I would have to verify that. That sounds reasonable.

5 Q. Did you write all those reports, or did you just outline
6 them?

7 A. I wrote the reports. They're my work.

8 Q. Okay. Could you take a look at your transcript, at
9 page 78, lines 5 through 15?

02:25:36 10 A. Page 78, line 5?

11 Q. Line 5 through 15.

12 A. It says: I outlined the report.

13 Q. Okay. And could you look at your same transcript, at 261,
14 line 21?

15 A. Page 261?

16 Q. Yeah.

17 THE COURT: Do you have an objection?

18 MR. ZEBRAK: Your Honor, I don't understand this
19 would be an impeachment issue. He's just asking him --

02:26:03 20 THE COURT: Well, let's just see where it goes.

21 MR. BUCHANAN: Your Honor, if I might?

22 THE COURT: Proceed.

23 MR. BUCHANAN: All right, thank you.

24 BY MR. BUCHANAN:

25 Q. So you have --

1 A. I'm sorry. I'm not there yet.

2 Okay. 261?

3 Q. Yes.

4 THE COURT: What line?

5 BY MR. BUCHANAN:

6 Q. 21.

7 A. I say: In my view, I am the author. I started with the
8 outline.

9 Q. Okay. So you said you wrote the reports, and I asked you
02:26:40 10 if you just outlined them. So did you outline them or did you
11 write them?

12 A. I wrote them. I outlined them and I wrote them. I always
13 start with an outline.

14 Q. And if you look at your testimony there, doesn't it
15 describe that you had other people fill in the pieces and add
16 footnotes and add other text? All that happened?

17 A. Yes.

18 Q. And did lawyers helped write it?

19 A. Excuse me?

02:27:00 20 Q. Did lawyers contribute to the reports?

21 A. Well, there -- yeah, there are types of footnotes that I
22 don't know how to do properly, so in terms of you can see
23 there's technical legal things included in the report.

24 Q. So --

25 A. I --

1 Q. You testified that you were assigned a specific task here
2 and that at least the fundamental part of that task was to look
3 at all the ticket data that was given to you for the claim
4 period and determine how many notices were provided to Cox
5 subscribers by the plaintiffs for their works in suit after
6 they had received two; is that correct?

7 MR. ZEBRAK: Objection, Your Honor. That
8 mischaracterizes his prior testimony.

9 THE COURT: Okay. Why don't you ask him what his
02:27:54 10 understanding of what his assignment was.

11 MR. BUCHANAN: Could we pull up their, their
12 demonstratives? Yeah. If you could go to the next?

13 BY MR. BUCHANAN:

14 Q. So, so why don't you repeat again what your task was.

15 A. My first task was to do a works in suit analysis.

16 Q. So did you have a certain number of notices that you
17 looked at to try to determine whether someone was a so-called
18 repeat infringer? I think you used that term. That was three
19 or later, right?

02:28:51 20 MR. ZEBRAK: Objection. Mischaracterizes --

21 THE WITNESS: I'm not sure if you're talking about
22 the works in suit analysis or the repeat infringer analysis.

23 BY MR. BUCHANAN:

24 Q. Okay. So you looked at -- what is the claims period in
25 this case?

1 A. It's on the slide --

2 Q. No, I'm just asking you, do you know what it is?

3 A. February 1, 2013, until November 26, 2014. I'd have to
4 double-check that. I'm sorry.

5 Q. Okay. So as I understand it, when you -- you were asked
6 to look at that time period and determine and to locate those
7 Cox subscribers that received a notice from the plaintiffs
8 after they had received two prior notices; is that right?

9 A. That's right. The third or more, and that's depicted as
02:29:41 10 the second bullet on this page.

11 Q. So --

12 A. I'm sorry, three or more. Is that what I said?

13 Q. Pardon me?

14 A. I'm not sure if I said two or more or three or more. I
15 meant three or more.

16 Q. Were you able to determine -- when you did that, were you
17 able to determine how many of the three were from a third-party
18 content owner as opposed to one of the plaintiffs?

19 A. I did not do that analysis.

02:30:07 20 Q. Okay. Did you do the analysis to determine how many
21 received just one notice during the claim period?

22 A. I did calculate the number that received one, two, three,
23 four, every possible number. I, I computed the actual number
24 and the --

25 Q. Okay.

1 A. Yes. So --

2 Q. How many Cox subscribers received just one notice during
3 the claim period?

4 A. I don't have that number stored in my memory.

5 Q. Okay.

6 A. I computed it.

7 Q. How about two? Do you know how many received just two
8 during the claim period?

9 A. No, I don't --

02:30:49 10 Q. But you did --

11 A. -- recall.

12 Q. -- compute it?

13 A. I computed it for every number, one, two, three, four, up
14 to however many there were.

15 Q. But -- so you didn't include it in your report or your
16 testimony because you were told not to; isn't that true?

17 A. No.

18 MR. ZEBRAK: Objection, Your Honor. Compound.

19 THE COURT: He answered the question no.

02:31:12 20 BY MR. BUCHANAN:

21 Q. Okay. Could you take a look at your deposition transcript
22 at page 91, please? Line 14.

23 A. I'm sorry, I'm not there yet.

24 Q. Okay.

25 A. Okay. I'm on page 91.

1 Q. Okay. Line 14 through 17, could you read that, please?

2 A. And why did you not include the first and second notice?

3 MR. ZEBRAK: Your Honor, may we have a sidebar?

4 THE COURT: Well, no.

5 Does that refresh your recollection as to why you did
6 not include one and two?

7 THE WITNESS: Line 14 just has a question why.

8 THE COURT: All right, let's come to the sidebar.

9 NOTE: A sidebar discussion is had between the Court
10 and counsel out of the hearing of the jury as follows:

11 AT SIDEBAR

12 THE COURT: Okay. What's the objection?

13 MR. ZEBRAK: Well, on two fronts. First of all,
14 Mr. Buchanan is a well-experienced attorney. He knows how to
15 do impeachment. And what he's doing is he purports to be
16 refreshing recollection, yet he's just asking him to read his
17 transcript into the record.

02:32:59

18 Number one, I believe that to be improper. Number
19 two, he's conflating the repeat infringer analysis with the
20 works in suit analysis, and specifically he's already testified
21 that plaintiffs set the criteria for the works in suit
22 analysis, and now he's saying, in the works in suit analysis,
23 why didn't you look presumably for those works infringed in a
24 person's first or second notice, whereas plaintiffs, you
25 know --

1 THE COURT: He's framing what he was asked to do in
2 his report, and if that came from instructions from plaintiff,
3 that came from instructions from plaintiff. If it didn't and
4 he made that decision independently, he can testify about that.
5 What's wrong with that? I don't understand this.

6 MR. ZEBRAK: Sir, there's nothing wrong with that,
7 and I don't object on that basis. What I was saying is that he
8 already testified that plaintiffs' counsel gave him the four
9 criteria, and I just think that -- I have an issue with having
02:33:44 10 him just read his transcript into the record, and I think the
11 whole line of questioning is confusing because it's imprecise
12 between the two analyses.

13 THE COURT: Okay. So I've already asked that you --
14 if you're going to refresh his recollection, just point to the
15 page and line and let him read it and say, does that refresh
16 your recollection? If it doesn't, then you can go to past
17 recollection recorded, and didn't you say previously, and then
18 he's allowed to read it into the record.

19 Is that -- am I missing something here?

02:34:15 20 MR. OPPENHEIM: May I ask a -- offer an idea here?
21 Dr. McCabe is not an experienced witness, unlike a lot of the
22 experts here, and that's fine.

23 THE COURT: Yeah.

24 MR. OPPENHEIM: He doesn't understand that he's not
25 supposed to read it into the record when he's asked to refresh

1 his recollection. Maybe we could just instruct him that, have
2 him read it to himself --

3 THE COURT: Okay.

4 MR. OPPENHEIM: -- so we do this properly.

5 He can either impeach him or he can refresh his
6 recollection, but, you know, there's a way to do this, and
7 Mr. Buchanan knows how to do it.

8 THE COURT: Okay. Understood. I'll so educate him.
9 All right?

02:34:42 10 MR. OPPENHEIM: Thank you, Your Honor.

11 NOTE: The sidebar discussion is concluded;
12 whereupon, the case continues before the jury as follows:
13 BEFORE THE JURY

14 THE COURT: All right. So, Dr. McCabe, when counsel
15 asks you to -- when counsel asks you to look at a certain page
16 or paragraph to see whether that refreshes your recollection,
17 you don't need to read that into the record. You just need to
18 read it to yourself and say yes or no, and then we'll follow up
19 from there. Okay?

02:35:30 20 THE WITNESS: Thank you.

21 THE COURT: Does that work?

22 THE WITNESS: Yes.

23 THE COURT: All right. Thank you.

24 Please proceed, Mr. Buchanan.

25 BY MR. BUCHANAN:

1 Q. So I'll ask the question again: Why didn't you include
2 those subscribers who received one or two notices in terms of
3 linking them to the works owned by the plaintiffs?

4 A. Are we talking about the repeat infringer analysis or the
5 works in suit analysis?

6 Q. We'll start with the works in suit.

02:36:18

7 A. Okay. So the works in suit analysis, yes, this talks
8 about linking notices with works in suit, and there I was told
9 that, and that was on the slide, that I should look at third or
10 later infringement.

11 Q. Okay.

12 A. So I counted the first infringement and second
13 infringement, but in works in suit, I looked at only those
14 infringements corresponding to a third or later infringements,
15 and, yes, I was told that was part of my assignment, if you
16 will, or the framework of what I was asked to do.

17 Q. So you were told in that particular situation not to
18 include the one and two?

02:36:49

19 A. I included them in that I counted them, and that's how I
20 determined which one was the third. So, yes, they were
21 included in the analysis. I need to know that there is a one
22 and a two to define what No. 3 is, etc.

23 Q. But you didn't include it in your report, correct?

24 A. It's not in a report of the works in suit.

25 Q. So could we go to your expert report, your first one?

1 It's tab 2, and look at paragraph 16a.

2 Do you have that?

3 A. I do.

4 Q. Okay. So that section says Cox's copyright abuse ticket
5 records indicate that it received at least 315,054 notices
6 between January 1, 2012, and December 1, 2014. Of those,
7 42,000 were sent regarding --

8 THE COURT: Slow down a little bit so we make sure we
9 get this on the record, please.

02:38:17 10 MR. BUCHANAN: Okay.

11 BY MR. BUCHANAN:

12 Q. Of those, 42,236 were sent regarding a subscriber for whom
13 Cox had previously received at least one other notice.

14 Do you see that?

15 A. I do.

16 Q. So if you subtract 42,236 from 315,054, you get about
17 272,000 notices, right?

18 A. I'll assume that your arithmetic is correct.

19 Q. But those that -- that can't be right, could it, because
02:38:50 20 we have 57,000 subscribers, so you couldn't have 272,000
21 notices that went to 57,000 subscribers and just got one
22 notice. That math is not right, is it?

23 A. I'm not following your math or your argument.

24 Q. Okay. You say there that there were 315,000 notices,
25 right?

1 THE COURT: Notices or tickets?

2 MR. BUCHANAN: Notices.

3 THE COURT: Okay.

4 BY MR. BUCHANAN:

5 Q. Do you see that? And you have --

6 A. Yes.

7 Q. -- 42,000 notices were sent to a subscriber for whom Cox
8 had previously received at least one other notice.

9 A. At least one other --

02:39:23 10 Q. Okay.

11 A. -- notice.

12 Q. So that means the difference went to the other
13 subscribers, right, the ones that just got one, those that
14 didn't get more than one, right?

15 A. At least one other means two or more.

16 Q. Okay. So 42,000 of the 315,000 notices were sent to
17 someone that had at least two. So that means the difference is
18 270,000, and that went to those that had one, right?

19 A. We're talking about notices, not subscribers, right?

02:40:05 20 Q. It said -- you wrote it. It says notices.

21 A. Notices.

22 Q. Okay. So you can't --

23 A. But your arithmetic was doing subscribers, right?

24 Q. I'm just -- I'm doing your math. 315,000 notices,
25 42,000 notices went to subscribers who had two or more. That

1 means the difference went to the others, which would be those
2 with one. And you can't send 270,000 notices to 57,000 people
3 and have one for one, can you?

4 A. This isn't counting people. The other displays were
5 counting subscribers. This is notices.

6 Q. Well --

7 A. And the arithmetic doesn't match because it's --

8 Q. But you wrote this. I'm just asking you --

9 A. Yeah, I'm not disputing what I wrote. I don't understand
02:41:03 10 why it's inconsistent with something else I wrote concerning
11 subscribers.

12 Q. Well, I don't know what else -- you say you're referring
13 to some other thing you wrote. I'm just looking at this, the
14 summary of your opinions, the very first one in this report
15 that you spent, looked at all that data and analyzed it, and
16 the very first one doesn't seem to me to make any sense.

17 A. So it says -- so I -- I don't understand what doesn't make
18 sense. You took the 315,000 and subtracted 40,000, and what
19 doesn't make sense about that subtraction?

02:42:04 20 Q. Because that means 42,000 of the 315,000 notices went to
21 people that had two or more, which means the difference,
22 270,000, went to those that had one, but if you have 57,000
23 subscribers and there's 270,000 notices, that is not one for
24 one.

25 All right. Why don't we go to another calculation.

1 MR. OPPENHEIM: There's no answer.

2 THE COURT: Yeah, let him answer. Do you want to
3 explain that?

4 THE WITNESS: No, I'm still a little confused about
5 what, what you're --

6 THE COURT: Okay. All right. Please proceed,
7 Mr. Buchanan.

8 BY MR. BUCHANAN:

9 Q. Okay. Could you turn to paragraph 50 of your report?

02:43:03 10 So here's one of your findings --

11 A. I'm sorry, I'm not there yet.

12 Q. Okay. It's page 10.

13 A. Got it.

14 Q. Paragraph 50, you talk about some action content data, and
15 what I'm focusing on, you have hard limits for complaints with
16 24 percent, and you cite appendix 6. Do you see that?

17 A. I do.

18 Q. Okay. Let's look at appendix 6. Hard limit for
19 complaints is about 47,000, right?

02:43:40 20 A. I'm sorry, where -- you're at appendix 6?

21 Q. This is your appendix, right? You created this?

22 A. We're on appendix 6?

23 Q. Yeah. You created this document, right?

24 A. Yes.

25 Q. Okay. Hard limits for complaints, do you see that,

1 47,000?

2 A. 46,997, yes.

3 Q. Okay. Can we use 47,000?

4 A. Yes.

5 Q. Okay. So you're saying the hard limit for complaints
6 was -- this 47,000 was 27 percent of 315,000 unique tickets,
7 right?

8 Go back to paragraph 50 on page 10. Do you see the
9 24 percent?

02:44:22 10 A. Yes.

11 Q. And it's actually 14 percent if you divide 315,000 into
12 47,000, is it not?

13 A. I'm not following what you're saying, but I think you're
14 addressing the missing values. Is that --

15 Q. Do you see paragraph 10? It says hard limits for
16 complaints was 24 percent of 315,000.

17 Correct?

18 A. Hard limits for complaints was 24 percent. Yes.

19 Q. But 47,000 --

02:45:01 20 THE COURT: Hold on. Let him look at it.

21 MR. BUCHANAN: Okay.

22 THE WITNESS: I see it says 24 percent there, yes.

23 BY MR. BUCHANAN:

24 Q. Okay. So that's 24 percent of 315,000, right?

25 A. Where are you getting the 315 from?

1 Q. 48, paragraph 48.

2 A. Oh, I'm sorry, where on paragraph 48?

3 Q. So we were at paragraph 50. Now we're trying to get the
4 calculations that you did, you know, using the applied
5 statistics.

6 A. Okay. So in paragraph 48, where --

7 Q. It says --

8 A. You're taking the number 315,054 --

9 Q. Right.

02:45:42 10 A. -- unique tickets.

11 Q. So if you divide 315,000 into 47,000, it's not 24 percent,
12 is it?

13 A. I don't think that's the arithmetic that we're -- I don't
14 think we're on the same page there. Because you're talking
15 about the number of unique tickets? So a particular ticket
16 could have more than one action content form entries, I
17 believe. So I don't think the -- you can, you can do that.
18 I'm not sure.

19 Q. So where did you -- what is the 47,000 hard limits, what
02:46:27 20 is that 24 percent of?

21 A. Of the --

22 Q. Okay. Take --

23 A. It would be of the appendix 6 --

24 THE COURT: Hold on, let him finish. Go ahead.
25 Finish, Doctor.

1 THE WITNESS: If you look at appendix 6, and this is
2 a standard thing in the output, the last line there says:
3 Frequency missing, 369,284.

4 So that's the number of entries in the Cox ticket
5 data that had nothing in the field action content form. Action
6 content form could have any of these things listed in
7 appendix 6, or it could have nothing.

8 So the percent was computed -- which one were we
9 talking about? The --

02:47:34 10 THE COURT: 24 percent.

11 THE WITNESS: The 24 percent for hard limit for
12 complaints, and that's given in this output. So it's
13 23.4 percent. That's of the non-missing entries for the field
14 action content form, 24 percent or 23.4 percent of those had
15 the words "hard limit for complaints" entered into that field.

16 BY MR. BUCHANAN:

17 Q. So --

18 A. So that's what's computed here.

19 Q. So, I'm sorry, you divided what number into the 47,000?

02:48:23 20 A. The -- I didn't divide. This is what the software
21 produces, standard output for this kind of data. You look at
22 the entries that are not missing, and you divide out by the
23 total number of those.

24 So if you take the column Frequency in appendix 6 and
25 add up all of those, that's the denominator that's used as the

1 basis for the, for the 24 percent. That number is not given on
2 the output. What is given is just the -- at the bottom with an
3 asterisk the number of missing or it calls it null, null values
4 for action content form.

5 Q. So you're saying that if you divide 370,000 into 46,000,
6 it comes to 24 percent?

7 A. Could you say that again?

8 Q. We can move on.

9 Why don't I direct your attention to your transcript,
02:49:36 10 page 194. See if that refreshes your recollection that we
11 discussed that in your deposition.

12 A. 194?

13 Q. Yes, line 7, 7 through 11.

14 A. I'm sorry, I'm not there yet.

15 Q. Okay.

16 A. Page 194, line 7.

17 Q. So read, read the question and answer there, and tell me
18 if that doesn't refresh your recollection as to how we did the
19 calculation during your deposition, when you were -- you were
02:50:23 20 also under oath there as well.

21 A. I recall the conversation that we had, and my
22 understanding is that it's exactly the same as the conversation
23 that we just had.

24 Q. Okay.

25 A. I explained to you what the software does, that that's a

1 standard output for a categorical variable. When you compute
2 percents, you divide by the number of non-missing values.
3 There would be an option to divide by some other number if you
4 would like to divide by some other number, but that's not what
5 the, the default or standard calculation is.

6 Q. So if I may just read the Q&A of this, that's --

7 THE COURT: Is it inconsistent with what he just
8 talked about?

9 MR. BUCHANAN: It is inconsistent.

02:51:09 10 THE COURT: Go ahead.

11 BY MR. BUCHANAN:

12 Q. Okay. So what I asked you -- by the way, there's two
13 lawyers that are objecting, you know.

14 THE COURT: I haven't heard any objection.

15 MR. BUCHANAN: All right.

16 THE COURT: And let's be calm and quiet here unless
17 you have a formal objection. Then stand up and say, "Object,"
18 okay?

19 MR. OPPENHEIM: Yes, sir.

02:51:27 20 THE COURT: Okay.

21 BY MR. BUCHANAN:

22 Q. So there you say -- I asked you: Okay. So a hard limit
23 for complaints of 46,997 is not 24 percent of 315,000, is it?

24 That's correct.

25 So -- it's 14 -- it's about --

1 It's necessary to read it very carefully. So 16a
2 says -- and then you talk about the copyright, and then --

3 MR. ZEBRAK: Objection, Your Honor. He's not reading
4 it.

5 THE COURT: Overruled.

6 BY MR. BUCHANAN:

7 Q. So, so you read that? I ask you: So a hard limit for
8 complaints of 46,997 is 24 percent of 315,000?

9 And you said: That's correct?

02:52:15 10 A. I'm sorry, what line are you on? I'm having trouble
11 following you.

12 Q. Line 7.

13 A. Line 7, okay. This says 24 percent is not something, and
14 that's just arithmetic you're saying, right?

15 Q. Right. That's how we started out as doing that
16 calculation, and here you agreed that the arithmetic worked,
17 and you didn't dispute the numbers in the calculation, did you?

18 A. If you take 46,000 and divide by 350,000, you don't get 24
19 percent. I agree. I think that's what I was -- it's hard to
02:52:53 20 take this out of context, so yeah. But that --

21 Q. Could, could you take a look at your report, paragraph 49
22 and 50? We were just there.

23 And you have a lot of data here, part of your
24 findings, 49 and 50, we went over one part of it, but isn't it
25 true when you put that information in there, that you didn't

1 understand what it was?

2 A. No.

3 Q. Okay. Could you look at paragraph -- page 189 of your
4 deposition? So --

5 A. I'm not there yet.

6 Q. Okay.

7 A. Okay.

8 Q. All right. So if you look at page 189 of your deposition,
9 line 3, can you just read down and over to the next page, down
02:54:27 10 to 14?

11 A. Wait. So read page 189, starting on line 3?

12 Q. At line 1 -- or line 3, yes. And then if you go over
13 to --

14 A. I don't understand what it's referring to, starting on
15 line 1 or line 3, because it says: You're not suggesting that
16 means --

17 Q. Okay.

18 A. I don't know what that refers to.

19 Q. Okay. Go back -- just a little higher and start with
02:55:05 20 line 16 on 188, where it says: Then if you look at sent
21 warning, changed status to closed.

22 All right?

23 A. Okay. I need to do this a little bit slowly because I
24 haven't looked at this in a while.

25 Q. Okay. That's fine. And then if you need to, you can go

1 back to paragraphs 49 and 50 of your report and see if that's
2 not what we're discussing there.

3 A. So I -- you asked me a question: Do you have any idea why
4 they're using that terminology?

5 And I said: No, I don't know why Cox is using that
6 terminology in their data file. All I know is that the
7 relative frequency of the different terms that they used -- and
8 that's what I reported in that appendix, or No. 6. I don't
9 know if --

02:56:21 10 Q. So --

11 A. But I don't know anything more than what those words said,
12 and I, you know, had the computer read those words and put them
13 in, in the summary.

14 Q. So my question was those are more findings that you made
15 using the applied statistics, and what I was asking you is even
16 though you put those findings in there, you didn't really know
17 what they meant. And are you agreeing with that?

18 THE COURT: What they meant to Cox?

19 MR. BUCHANAN: What they meant to him in reading
02:56:54 20 them.

21 THE WITNESS: What they meant to me was that they
22 were different entries in the computer file.

23 BY MR. BUCHANAN:

24 Q. But you didn't --

25 A. As I said, I took the data at face value. This is Cox's

1 data, and I made a table of the different possible entries that
2 could be in that column and counted them.

3 Q. Okay. These are findings, and isn't it true that you put
4 these findings in there even though you didn't know what the
5 data meant? Isn't that what that passage is I just showed you?
6 Doesn't it say --

7 A. I did not have any definition of those terms; that's
8 correct.

9 Q. Okay. So if you don't have a definition, that means you
02:57:30 10 don't know what they mean.

11 A. Not necessarily, but I would -- as I said, I don't, I
12 don't know why they're using that terminology.

13 Q. Okay.

14 A. I don't know the meaning of those things. I was just
15 trying to describe the data that was given to me by Cox.

16 Q. And didn't you actually ask people -- in fact, you asked a
17 lot of people what that meant, but you couldn't get any
18 answers; isn't that right?

19 A. No.

02:57:55 20 Q. Isn't that what -- go read the passage again. See if it
21 doesn't say that.

22 A. That it says I asked a lot of people? I didn't see that.

23 MR. BUCHANAN: Can I read or no?

24 THE WITNESS: Where are you?

25 THE COURT: Direct him to a line and --

1 BY MR. BUCHANAN:

2 Q. Okay. Line 1, page 190: -- tell me what they mean, give
3 me definitions. Give me -- we even have words for that. In
4 some computer statistical packages --

5 And you say you called it a code book?

6 MR. ZEBRAK: Your Honor?

7 THE COURT: Yes, sir.

8 MR. ZEBRAK: I'm not sure what's happening now.

9 THE COURT: All right.

02:58:33 10 MR. ZEBRAK: This is --

11 THE COURT: Well, let's go back, the question was --
12 did you ask -- he asked you whether you had asked lots of
13 people. He directed you to this specific reference in the page
14 and line, and does that refresh your recollection?

15 THE WITNESS: No, not, not what I read on page 190.

16 THE COURT: Okay. All right. Next question.

17 MR. BUCHANAN: I'm sorry, I didn't hear that.

18 THE COURT: He said no, it doesn't refresh his
19 recollection. I don't know what's on the page. Do you want
02:59:09 20 to -- do you want to --

21 MR. BUCHANAN: Am I allowed to --

22 THE COURT: Yeah, you can now use the statement and
23 ask him did he not -- did I not ask you this question and did
24 you not say the following?

25 MR. BUCHANAN: All right.

1 THE COURT: Please go ahead.

2 BY MR. BUCHANAN:

3 Q. So, so we'll start there, and at the top, it says -- you
4 actually answered my question about did you try to find --

5 THE COURT: Let's ask questions and see if he
6 answered it inconsistently with what he's saying today.

7 BY MR. BUCHANAN:

8 Q. Okay. The question I asked you earlier was, you already
9 said you didn't know the definitions of the words and you just
02:59:54 10 put them in there as your findings, and I asked you didn't you
11 actually go try to find out the answers to that?

12 And you made a reference to, like, the code book in
13 applied statistics, that that's what you're looking for.

14 THE COURT: None of that's in the record. It's all
15 stricken.

16 MR. BUCHANAN: All right.

17 THE COURT: And I know you're trying to explain the
18 setting here, but that is not the way this works, because now
19 you're testifying again, and we went through that.

03:00:21 20 MR. BUCHANAN: All right.

21 THE COURT: It assumes facts not in evidence. But if
22 you have a question and an answer which is inconsistent with
23 what he's said today, you certainly may impeach him with that,
24 but not the following paragraphs and see if you don't get a
25 sense of this or that.

1 THE WITNESS: If I could clarify my answer, I
2 think --

3 THE COURT: No, let's wait for --

4 MR. BUCHANAN: I can, I can read what he testified to
5 now, right?

6 THE COURT: If there's a question that you asked him
7 and he answered inconsistently, you certainly can read that and
8 say, didn't you say that previously?

9 MR. BUCHANAN: All right.

03:00:59 10 THE COURT: Sure.

11 MR. BUCHANAN: He says he doesn't remember, but the
12 passage says what he says.

13 THE COURT: Didn't you say in your deposition when
14 you were asked the following question and the following answer?

15 BY MR. BUCHANAN:

16 Q. Now, I'll ask it again, and this is how we started, and I
17 asked you -- you gave me one answer, that -- about you didn't
18 have the definition. I asked you: Did you ask people that you
19 were working with, including, you know, all the people you're
03:01:29 20 working with, whether, in fact, you sought from them what those
21 words meant that went into those two findings?

22 And are you saying that you didn't ask anyone?

23 A. I can explain. I apologize that I answered too quickly.
24 I did not read all of page 190. I felt a little bit rushed. I
25 read the top part; I didn't read the bottom part.

1 So there is a question that was asked to me, and I
2 answered: I always asked everybody give me what I would call
3 the code book.

4 That answer refers to my general behavior or
5 procedures when I get data, and that is, can you give me the
6 code book? That code book is particular jargon for a
7 statistical package called SPSS, and it does exactly what --
8 the kind of things we were talking about. It would give me the
9 list of possible values for those fields that are given in
03:02:43 10 that, that appendix, and what each of them means.

11 I said: Do you have that? I asked plaintiffs'
12 counsel: Do you have a code book that explains all these
13 variables?

14 The answer was no.

15 So -- but the context of did I ask everybody, I
16 always ask everybody: Can you give me some data, tell me what
17 I need to know about each of the fields and the meaning of
18 those, those entries.

19 THE COURT: All right. Thank you, sir.

03:03:13 20 All right. Next question.

21 BY MR. BUCHANAN:

22 Q. Okay. And I think you -- okay. So you said that you
23 asked for it, and you didn't receive it, and I think -- do you
24 recall that you don't know why you never received it?

25 A. I don't think it exists.

1 Q. Why don't you take a look at your testimony there and tell
2 me if, in fact, you say that, that it doesn't exist. Why don't
3 you read where it starts, line 11: So I never received that,
4 and I don't know why.

5 And then read the rest after that.

6 A. I had a lot of other things to do, and I never pursued
7 this any further than to summarize in the summary that I gave
8 in this report.

9 Q. So you had a lot of -- those are findings in your report,
03:03:59 10 and you had -- you're saying you had a lot of other things to
11 do, and so you just moved on.

12 A. That's a fair summary of what I said, I believe.

13 Q. Okay. All right, can we pull up their slides?

14 Okay. Let's go to slide 7. Now, the claims period,
15 I think you correctly testified, is in February 2013 to
16 November 2014. Do you remember that?

17 A. I do.

18 Q. Okay. This goes beyond that, a year earlier and a month
19 later, right?

03:05:13 20 A. That's correct.

21 Q. Okay. So did you actually analyze this same data for the
22 claims period which is at issue in this case?

23 A. No.

24 Q. Okay. And is that because you were told not to do it?

25 A. No.

1 Q. You just decided not to do it?

2 A. I didn't decide not to do things. I decided to do things.

3 Q. Okay. In fact, you did run the numbers.

4 THE COURT: Let him finish answering.

5 MR. BUCHANAN: Okay.

6 THE COURT: Were you finished, sir?

7 THE WITNESS: I think so.

8 BY MR. BUCHANAN:

9 Q. You did run those numbers, though, right?

03:05:47 10 A. No.

11 Q. You never did.

12 So let's start with January 1, 2012. You have 31,000
13 that had three or more, right?

14 A. That's what the display says, yes.

15 Q. How many had three?

16 A. It's not given on this chart.

17 Q. Well, I see that. I'm sorry. But did you calculate that?

18 A. Yes.

19 Q. Okay. What is it?

03:06:17 20 A. I don't recall.

21 Q. Okay. So this -- if you have 57,000 subscribers and
22 31,000 had three or more, how many had one or two?

23 A. The number is not on the chart. I computed it, and I
24 don't have it in my memory.

25 Q. Okay. Well, I'm just -- I was asking you to do the math

1 for me. 57,000 minus 31,000 is about 26,000.

2 A. The difference would be the number who had two or one.

3 Q. Okay. That's statistics, right? That's sort of --

4 A. It's arithmetic.

5 Q. Okay. So that means of all these subscribers, or all
6 tickets, which means we're talking about a three-year period, a
7 year beyond the claims period, right, and 26,000 had one or
8 two; is that right?

9 A. Approximately, yes.

03:07:13 10 Q. And do you know how many of those 26,000 had one?

11 A. As I said, I don't.

12 Q. Okay. And so then you go to six-plus, so again we're
13 talking about three years, and all ticket data means notices
14 from everyone that came into the tickets for that three-year
15 period, right, from the plaintiffs and from other content
16 holders that sent notices, right?

17 A. Correct.

18 Q. Okay. So if we go to six-plus, if you take -- subtract
19 31,000 from 16,000, we get 15,000 that had five or less,
03:07:54 20 correct?

21 A. You're doing 57 minus --

22 Q. 31,000 minus --

23 A. -- 16?

24 Q. -- 16,000, trying to get to those who had five or less.

25 Maybe you could do it for me.

1 A. To get five or less? I don't think you can recover that
2 from here.

3 Q. Well, if you have six-plus had 16 and you have 31,000 that
4 had three-plus, isn't the difference those that are in between?

5 A. Four or five.

6 Q. Yes.

7 A. But you said five, I thought.

8 Q. Oh, I said five or less.

9 A. Five or less. Yes, you could do that subtraction.

03:08:35 10 Q. Okay. So that would be 41,000 that had five, four, three,
11 two, or one, right?

12 A. You're saying 57,000 minus 16,000, okay. Is that what
13 you're saying?

14 Q. No. So what I'm getting at, if we get 31,000, 57,000,
15 that gave us 26,000 that had one or two?

16 A. You know, you're reading, it, and I can't process it that
17 fast; I'm sorry. I could write it down if you want or if you
18 want to write it down, but I -- you're just throwing numbers at
19 me. I can't do that.

03:09:11 20 Q. Okay. Just -- okay. Tell me how many had five or less
21 based on your chart. Can you calculate that?

22 A. That would be the difference between the total and the
23 number who have six or more, yes.

24 Q. And so how many would that be?

25 THE COURT: He just said he can -- if you want him to

1 write it down and subtract it, he'll do it. Otherwise, he's
2 given you his answer.

3 MR. BUCHANAN: Okay.

4 THE COURT: He's answered your question. Move on to
5 the next question.

6 MR. BUCHANAN: Okay.

7 THE COURT: Unless you want to give him a number and
8 ask him whether that sounds reasonable. I assume you have done
9 the math, and he's not here to do math, okay? I mean, he's not
03:09:50 10 here to do this function of the math. So if you have the
11 number --

12 MR. BUCHANAN: All right. Okay, Your Honor. I did,
13 I thought I tried to calculate.

14 BY MR. BUCHANAN:

15 Q. It's 41,000 that had five or less, right?

16 A. Yes, that looks right.

17 Q. Okay. And then isn't it nine or less, isn't it almost
18 50,000?

19 A. You do the complement of those numbers; that's correct.
03:10:11 20 Whatever that number, that arithmetic gives you, yes.

21 Q. So if you had nine or less, that could be three a year,
22 three in 2012 through three in 2013, three in 2014, right?

23 A. I wouldn't draw that conclusion. You say an average of
24 three or --

25 Q. Do you know when these notices came in?

1 A. No.

2 Q. Do you know whether they relate to a business subscriber
3 or a home?

4 A. No.

5 Q. So you don't know if they're, like, a hotel or -- a hotel
6 or a hospital versus a residence?

7 A. I was not given that information.

8 Q. Okay. But you, you do know how many business subscribers
9 there were, correct?

03:10:51 10 A. Yes.

11 Q. Okay. And you originally calculated that like 1800, and
12 then you increased it in your supplement report to 2800, right?

13 A. I don't recall all those numbers, I'm sorry.

14 Q. So do you recall the average amount of notices that a
15 business subscriber received during this time period?

16 A. I don't believe I calculated that kind of summary, but I
17 could have.

18 Q. All right. So, so could you go to your reply report? I
19 think it's tab, tab 4, paragraph 23. If you read that
03:12:16 20 paragraph of your report -- you wrote this, right?

21 A. Yes.

22 Q. Okay. So you say there's 2,868 business subscribers, and
23 what's the mean or the average?

24 A. I said I replicated Dr. Weber's calculation finding -- and
25 the median is given as 4 and the mean is given as 15.9. This

1 is a classic example why the mean is not a good descriptor of
2 the center of a distribution. It's highly skewed.

3 Q. I asked you if you calculated the mean. That's all.

4 A. That's what it says.

5 Q. That's what it says. You did that, right?

6 A. Yes.

7 Q. Okay. So when we go over here, if you apply the business
8 subscribers to the 13-plus and the 14-plus, they average 16?

9 A. I didn't -- I said I replicated Dr. Weber's calculation.

03:13:20 10 Q. And who is Dr. Weber?

11 A. One of your experts, I believe.

12 Q. She calculated numbers like you did in terms of --

13 A. I calculated what she reported and verified the accuracy
14 of her arithmetic.

15 Q. So you just -- is there a footnote to her report here?

16 All right. So you just took her number and put it in
17 your report, but you agree with it, right?

18 A. I verified the arithmetic that she performed.

19 Q. And then you used it in your report, so it must have had
03:14:00 20 some significance, right?

21 MR. OPPENHEIM: Your Honor, Dr. Weber has not
22 testified.

23 THE COURT: Stop. You're testifying, and he has a
24 right to ask why he put it in the report.

25 Ask him, do you recall -- you may testify as to why

1 that is put in your report. I think you just testified that
2 you were testing her math; is that right?

3 THE WITNESS: That's correct.

4 THE COURT: All right. And is that why it's in the
5 report?

6 THE WITNESS: Yes.

7 THE COURT: All right. Let's move on.

8 BY MR. BUCHANAN:

9 Q. Okay. So the question I have for you is did you
03:14:44 10 determine, like, for those who had 14 or more, how many of
11 those were business subscribers considering that they averaged
12 16 notices?

13 A. I didn't --

14 Q. Okay.

15 A. -- do that calculation to the best of my knowledge, no.

16 Q. So when we get to, like, 14, what percentage of 4,400 is
17 of 57,000?

18 So in other words, if you've calculated how many
19 subscribers had dropped off at this point were no longer
03:15:19 20 getting notices at the 14 level, is that about 90-some percent,
21 95 percent?

22 A. You're asking me to compute 4,400 divided by 57,600?

23 Q. Yes.

24 A. I don't have my phone or I would do it.

25 Q. Okay.

1 A. I can't do that -- I don't do arithmetic in my head
2 particularly with a microphone in my face.

3 Q. Okay. You could do -- 5,700 of 57,000 would be 10
4 percent, right?

5 A. In rough, round numbers, yeah.

6 Q. So that would be 90 percent. So 4,400 would be more like
7 93, 94 percent?

8 A. If you say so.

9 Q. Okay.

03:16:11 10 A. I don't doubt it.

11 MR. BUCHANAN: All right. We'd like to move this
12 into evidence, Your Honor.

13 THE COURT: All right. This exhibit with the
14 highlights is a new exhibit?

15 MR. BUCHANAN: This demonstrative.

16 THE COURT: Okay. Is there any objection?

17 MR. ZEBRAK: Well --

18 MR. BUCHANAN: It's their exhibit.

19 THE COURT: Yeah.

03:16:28 20 MR. ZEBRAK: It's fine, but is his entire set of
21 slides going into evidence?

22 MR. BUCHANAN: I'm just moving this one.

23 MR. ZEBRAK: Well, if we move it all into evidence,
24 we're fine with that, Your Honor.

25 THE COURT: Yeah. All right. I'll consider that.

1 We'll talk about that later.

2 MR. BUCHANAN: Okay. Could we go to the next slide?
3 Next one? Oh, go back to that one. Thanks. Sorry.

4 BY MR. BUCHANAN:

5 Q. These 13 terminated subscribers, they only relate to these
6 particular notices, right? They don't relate to other notices
7 that we got during the time period? In other words, you're
8 just talking about --

9 A. They refer to the ticket data that I have.

03:17:20 10 Q. Beyond this, beyond this 57,000 subscribers, you didn't
11 look at data beyond that to see how many terminated subscribers
12 there were for this period beyond these particular works in
13 suit or these particular subscribers, right?

14 A. These 13 are a subset of the 57,600, yes.

15 Q. All right. Can we go to the next slide, please?

16 So earlier -- you just -- when I was asking you about
17 the subscribers, business subscribers, and then you calculated
18 it here, right?

19 A. Yes.

03:17:53 20 Q. And is this Dr. Weber's number?

21 A. I don't know.

22 Q. Okay.

23 A. I don't know if she had -- I didn't -- these are my
24 numbers.

25 Q. Okay. Let's go to the -- so on this one, 17,729

1 subscribers had tickets for notices from other rights holders,
2 right? So, so how many, how many tickets are we talking about
3 from these other rights holders? Are we talking about one for
4 the 57,000, you've determined that there was at least one
5 ticket relating to another rights holder for the subscribers in
6 question?

7 A. For each of the 57,600 subscribers, I computed a variable,
8 yes or no. Yes, they had a notice corresponding to another
9 rights holder, or no, they did not have a notice from another
03:19:03 10 rights holders. And this is the proportion of yeses for that
11 calculation.

12 Q. So when you actually did the task that you were to do,
13 which was to determine how many -- during the claim period, how
14 many Cox subscribers received a notice from the plaintiffs for
15 a work in suit after receiving two others, that two others
16 could be -- both those two others could be from some third
17 party, right?

18 A. That's correct.

19 Q. Did you determine how many of the 57,000 received two out
03:19:40 20 of the three from somebody else, like, you know, Amazon, HBO,
21 Disney?

22 A. I did not perform that calculation.

23 Q. And did you determine when these notices regarding the
24 17,729, did they come in in 2012, '13, or '14?

25 A. I did not calculate that.

1 Q. And in terms of the notices that we talked about, did you
2 determine whether they were with regard to the same musical
3 composition or sound recording? Well, actually forget musical
4 composition. Sound recording. Did you determine whether any
5 of those -- how many came into the particular subscriber that
6 related to the same song or album?

7 A. I'm not sure I understand the question.

8 MR. BUCHANAN: Can we back up? Keep going. One
9 more. Thanks, James.

10 BY MR. BUCHANAN:

11 Q. So the people that got one or two, did you determine
12 whether it related to the same song or not?

13 A. I just counted tickets.

14 Q. Okay.

15 A. I did not look at the song.

16 Q. So the people that got three, they could have gotten -- it
17 could be all -- it could be a kid that downloaded a Disney
18 game, and the family got three notices for the same downloaded
19 game over three days, right?

03:21:11 20 A. I believe so.

21 MR. ZEBRAK: Your Honor --

22 THE WITNESS: I don't have -- I know what's in the
23 data. That's all.

24 THE COURT: Overruled. If you can answer.

25 THE WITNESS: Yes.

1 THE COURT: He's asking you about, you know --

2 THE WITNESS: I guess I don't have -- I can't -- I
3 don't have that information.

4 BY MR. BUCHANAN:

5 Q. So in the bigger numbers, like 13-plus and 14-plus, the
6 13, that can relate to an internet service provider that had a
7 subcontract with us and then had, you know, 100,000
8 subscribers, right?

9 A. All I know is what was in the data that I have. I don't
03:21:47 10 know what it could have been. I know what was in the data.

11 Q. Okay. So you didn't look behind the data to see if it was
12 a residential subscriber, a business subscriber, or what type
13 of business subscriber, right?

14 A. I did not.

15 Q. Okay.

16 James, can you -- okay.

17 So you've talked about report -- repeat infringing,
18 or repeat infringers. This shows that as you move along,
19 there's fewer and fewer people repeating, right?

03:22:19 20 A. That's correct.

21 Q. The more notices they get, the fewer additional notices?

22 A. That would always be true for data displayed in this way.

23 Q. And that's what Lynn Weber's data showed, right?

24 A. I don't recall.

25 Q. Okay. And I think, isn't it your view that -- I guess you

1 didn't look at it for the claims period, but do you recall when
2 I asked you in your deposition about isn't it true that over
3 time, that you had -- most people had one or two and then some
4 had three, some had four; it just sort of then decreased,
5 right?

6 A. That's correct.

7 MR. BUCHANAN: Okay. So could you go to the next
8 slide, please? Go down a couple. The next one, please, James.
9 Thank you.

10 BY MR. BUCHANAN:

11 Q. So here again, we're outside the claims period by one
12 month on one side and a year on the other side, right?

13 A. That's correct.

14 Q. And you think your counsel asked you to do that?

15 A. That's the data that I was given.

16 Q. Okay. And you were asked to do this, right? You didn't
17 do this on your own. You were told to do this, right?

18 A. I was told to do a repeat infringer analysis.

03:23:42

19 Q. So your 13,400, obviously, that number of the subscribers
20 that got tickets before the claim period, these are subscribers
21 that got a ticket during the claim period, at least one?

22 A. That's correct.

23 Q. Okay. So they got one during the period 2013 and '14, and
24 then you're saying they got at least one in 2012?

25 A. Or before February 1, 2013.

1 Q. Okay. So that's three. So do you know the -- you know,
2 what time period they received the three notices?

3 A. For a particular --

4 Q. Yeah.

5 A. -- subscriber?

6 I mean, I have that information. I didn't summarize
7 that or report it.

8 Q. Did you distinguish between a business subscriber or a
9 residential subscriber?

03:24:24 10 A. I did not in this analysis.

11 Q. So this would be about 80 percent of the subscribers in
12 question in this case got no notices -- or got no tickets in
13 the year 2012 in the month of January prior to the claims
14 period, right?

15 A. That's correct.

16 Q. So 80 percent for 13 months got no tickets, and that would
17 mean including a notice from the plaintiffs or any other rights
18 holder that sent a notice in?

19 A. You're using 80 percent as the complement of 23 percent?

03:25:05 20 Q. Yes. I know it's 77.

21 A. Yes. So yes.

22 Q. Okay.

23 Is there another slide here? We can move that.

24 So Cox -- are you aware that Cox had 4.5 million
25 subscribers?

1 A. No.

2 Q. Okay. You were here for the testimony of
3 Dr. Barbara Frederiksen-Cross, right?

4 A. I heard some of her testimony. I don't think I was here
5 for all of it.

6 Q. Did you hear when she said there were 30 million people on
7 BitTorrent and these other sites on a daily basis?

8 A. I don't recall storing that information.

9 Q. Okay. So you testified at the beginning of your direct
03:26:15 10 examination that you accepted all of the data that was given to
11 you on face value, right?

12 A. That's correct.

13 Q. You didn't look behind it, correct?

14 A. That's correct.

15 Q. So if it was unreliable, then your, your analysis or
16 conclusions would be unreliable, right?

17 A. My understanding is that the data -- that somebody else
18 was responsible for the reliability of the data. I was not
19 responsible for it.

03:26:43 20 Q. But the question was if that data turns out to be
21 incorrect or inaccurate and you relied on it, then that would
22 make your conclusions potentially inaccurate?

23 A. Yes.

24 MR. BUCHANAN: Okay. I have no further questions,
25 Your Honor.

1 THE COURT: All right. Thank you.

2 Redirect?

3 MR. ZEBRAK: Yes, Your Honor. Thank you.

4 Could you pull up the demonstratives, Mr. Duval?

5 REDIRECT EXAMINATION

6 BY MR. ZEBRAK:

7 Q. Let's first start, Dr. McCabe, with the time you spent
8 working on this matter. Would you describe this -- how would
9 you characterize the degree of how hard you worked on this
03:27:51 10 matter?

11 MR. BUCHANAN: Your Honor, I -- that's way beyond the
12 scope of cross.

13 THE COURT: Oh, no.

14 MR. BUCHANAN: Okay.

15 THE COURT: I'll permit it.

16 BY MR. ZEBRAK:

17 Q. Before the objection, sir, I asked you how would you
18 characterize how hard you worked on this matter?

19 A. I worked very often from early, very early in the morning
03:28:14 20 until late at night.

21 Q. Did you have to work at nights?

22 A. Yes.

23 Q. Weekends?

24 A. Yes.

25 Q. Did you have to travel?

1 A. Limited travel, yeah.

2 Q. When you arrived here to testify this week, did you know
3 exactly what day you would have to testify?

4 A. I did not.

5 Q. Did you know how long plaintiffs' counsel or Cox's counsel
6 would take questioning witnesses?

7 A. I did not.

8 Q. Do you enjoy being away from your family for this matter?

9 THE COURT: All right, let's move on. This is
03:28:47 10 beyond -- I thought you were going to ask what he did during
11 the 100 or more hours that he worked on the case, and this is
12 outside of that. So let's move on.

13 MR. ZEBRAK: Yes, Your Honor. I'll move on.

14 BY MR ZEBRAK:

15 Q. Counsel asked you questions about the mechanics of the
16 preparation of your report. Do you recall that?

17 A. Yes.

18 Q. Asked you questions about who typed particular words or
19 footnotes going from your outline and revisions? Do you recall
03:29:17 20 that?

21 A. I recall the questions.

22 Q. Whose work product is reflected in that report?

23 A. It's my report.

24 Q. Do you stand behind that work product?

25 A. I do.

1 Q. Does anything from counsel's questions today cause you to
2 doubt the accuracy and reliability of your findings?

3 A. No.

4 Q. Now, I'm going to ask you not just about your reports but
5 about -- let's start with your demonstrative slides. Does
6 anything from counsel's questions today cause you to doubt the
7 accuracy and reliability of those slides?

8 A. No.

9 Q. Does anything from counsel's questions today cause you to
03:29:50 10 doubt the accuracy and reliability of the testimony you've
11 given?

12 A. No.

13 Q. Now, let me ask you some other questions. Counsel asked
14 you a series of fast questions about several pages of your
15 deposition testimony, and I believe they, they concerned
16 warnings. Do you recall that -- those questions?

17 MR. BUCHANAN: I'm going to object to that.

18 THE COURT: Warnings?

19 MR. ZEBRAK: Well, I'm framing the question, Your
03:30:18 20 Honor.

21 THE COURT: Well, you're testifying. Ask him --

22 MR. ZEBRAK: Yes, Your Honor.

23 THE COURT: -- whether he agrees or disagrees with
24 something that was brought to his attention.

25 MR. ZEBRAK: Sure.

1 BY MR ZEBRAK:

2 Q. I'd like to bring your attention, sir, to your deposition
3 testimony that counsel referred you to, at page 188 to 191.
4 I'd like to just remind yourself what he was questioning you
5 about. I'm going to ask a follow-up question.

6 MR. BUCHANAN: Your Honor, this is improper.

7 THE COURT: No, I think he's asking whether he would
8 like to further explain questions -- whether to further -- he
9 would like to amplify his answer to questions you asked on
03:31:01 10 direct where he was limited.

11 Is that right?

12 MR. ZEBRAK: That's exactly what I'm doing, Your
13 Honor. I'd like to give the witness an opportunity to look at
14 those pages so he understands the subject matter of the
15 questions from Cox's counsel, and I'm going to follow up.

16 THE COURT: Where do you want him to read?

17 MR. ZEBRAK: Oh, it was page -- I had done that
18 before the objection. It was --

19 THE COURT: 188 to 191?

03:31:23 20 MR. ZEBRAK: Yes, sir.

21 THE COURT: All right. Please review those pages,
22 Dr. McCabe.

23 THE WITNESS: Yes, I'm familiar with those pages.

24 BY MR. ZEBRAK:

25 Q. Are you familiar with what the phrase "sent warning"

1 refers to?

2 A. Not in fine detail.

3 Q. Does anything about your demonstrative slides today
4 address warnings?

5 A. It does not.

6 Q. Did anything about your testimony on direct involve a
7 calculation of the number of warnings Cox sent to customers?

8 A. I don't believe so.

9 Q. Now, I want to bring up one of your demonstrative slides,
03:32:26 10 sir. So we're back in the repeat infringer analysis. This is
11 the who, the repeat infringers, correct?

12 A. Correct.

13 Q. Okay. Now, the source of the information for this
14 analysis are whose records?

15 A. The --

16 MR. BUCHANAN: Your Honor, I'm going to object. He
17 asked -- asked and answered on direct, so I never asked
18 anything about it.

19 THE COURT: You asked lots of questions of where --
03:33:07 20 of the dates of the data and what the data represented, so I
21 think it falls within redirect. Ask your question.

22 MR. ZEBRAK: Thank you, Your Honor. I was just
23 framing the question to follow so it had some context before
24 the objection.

25 THE COURT: Go ahead.

1 BY MR. ZEBRAK:

2 Q. Let me start again. Whose records are you analyzing with
3 respect to repeat infringers?

4 A. This is the Cox ticket data.

5 Q. And these are ticket records concerning -- that stem from
6 copyright infringement notices, correct?

7 A. That's right.

8 Q. Okay. Now, do you know for what years Cox produced ticket
9 data for the 57,600 subscribers who were the subject of

03:33:40 10 MarkMonitor's notices?

11 A. The framework is the years 2012, '13, and '14.

12 Q. Now, do you know if -- do you know whether Cox produced
13 ticket data for 2009 in this litigation?

14 A. I have not seen any data from 2009.

15 Q. Do you know if Cox produced ticket data for 2010 in this
16 litigation?

17 A. I have not seen that.

18 Q. Do you know if Cox produced ticket data for 2011 for that
19 year?

03:34:16 20 A. I don't know.

21 Q. If that information existed, would that be something -- do
22 you have an objection?

23 THE COURT: Go ahead.

24 BY MR. ZEBRAK:

25 Q. If that information existed, would that be something that

1 you would include in a repeat infringer analysis to bring above
2 the fold what copyright infringement tickets Cox received for
3 the subscribers reported by MarkMonitor's notices in the claim
4 period?

5 MR. BUCHANAN: Objection, Your Honor.

6 THE COURT: Yes, sustained.

7 MR. BUCHANAN: Pure speculation.

8 THE COURT: Sustained. Let's move on.

9 MR. BUCHANAN: And just for -- if I may, I would also
03:34:55 10 object because the Court is the one that provided what data
11 would be produced, and so I don't want to testify, but he's
12 suggesting that somehow --

13 THE COURT: Understood. Let's go. That's why I
14 think it's an improper line of questioning. So let's move
15 along.

16 BY MR. ZEBRAK:

17 Q. As a statistician, do you choose to discard data that may
18 be relevant to your analysis?

19 A. No. I'm very sensitive about doing the best that I can
03:35:36 20 with all of the data that's available to me, no matter what the
21 circumstances.

22 MR. ZEBRAK: Thank you, Your Honor. No further
23 questions.

24 THE COURT: All right. May Dr. McCabe be excused?

25 All right. You're excused with our thanks,

1 Dr. McCabe. Please don't discuss the testimony you've given
2 with anyone until our trial is over. All right?

3 THE WITNESS: Thank you, yes.

4 THE COURT: All right. Thank you, sir. Have a good
5 afternoon.

6 WITNESS EXCUSED

7 THE COURT: All right. We're going to take our
8 mid-afternoon break. We'll take 15 minutes and we'll come back
9 and we'll be, we'll be adjourning at 5 p.m. All right?

03:36:15 10 So you're excused. Thank you.

11 NOTE: At this point, the jury leaves the courtroom;
12 whereupon, the case continues as follows:

13 JURY OUT

14 THE COURT: All right. Why don't you-all discuss
15 what you want to do with demonstratives now that Mr. Buchanan
16 made the motion to admit one of the slides. As you all know,
17 jurors are always interested in the demonstratives, so discuss
18 that at break and see if you can resolve that, and then we'll
19 talk about it when we come back.

03:37:13 20 Anything else before we break? Where are we on --
21 are we playing a deposition now?

22 MR. OPPENHEIM: We're going to call Linda Trickey
23 next, Your Honor. Frankly, we didn't think we were going to go
24 so long with Dr. McCabe.

25 THE COURT: Okay.

1 MR. OPPENHEIM: I would be highly skeptical, based on
2 the way things are going, if they're going to do Ms. Trickey's
3 direct in our case, that we're going to get past Ms. Trickey
4 today.

5 THE COURT: Okay.

6 MR. OPPENHEIM: But we are prepared to put forward to
7 the Court some issues with respect to the Zabek deposition so
8 we can get them resolved by the Court, whether you want to do
9 that.

03:37:52 10 THE COURT: Well, it sounds like -- the way I do that
11 is you give me a deposition transcript that has the direct and
12 the cross and the objections that each have, and you give me a
13 chance to look at it, and then we'll talk about it in the
14 morning.

15 MR. OPPENHEIM: So we have that cut with the
16 specifics. Does that work, color-coded?

17 THE COURT: Yeah, that's fine.

18 MR. OPPENHEIM: Does that work?

19 MR. ELKIN: We have some -- I need to take a final
03:38:20 20 look to see where it is, because they've been going back and
21 forth for a couple of days. So I'm hoping to be able to later
22 today, to look at that to get it resolved, if we can.

23 After Ms. Trickey, we have Mr. Carothers, Mr. Beck,
24 and Mr. Vredenburg here because they wanted them in their case.

25 THE COURT: Okay. It doesn't sound like we'll get

1 much past Ms. Trickey, but if we do, then call a live witness
2 after Ms. Trickey.

3 MR. OPPENHEIM: We're prepared to put the Zabek
4 objections before you now. We want as the plaintiffs to put
5 Mr. Zabek's testimony before the Court before Mr. Carothers
6 comes. That's the plaintiffs' choice. We should have that
7 option.

8 Mr. Elkin has had plenty of opportunity to look at
9 these objections, his other partners have, and I would hate to
03:39:08 10 have delay cause us not to put our case on in a sequence that
11 makes sense to the jury.

12 MR. ELKIN: That's not the issue. The issue is that
13 it's four hours, and you've called these witnesses to support
14 your case-in-chief, and they've come out of town for this over
15 our objection, and we understand the ruling was against us.
16 They're here.

17 THE COURT: Yeah. As I said earlier, I'm not going
18 to have the jury sitting in there while you're fighting about
19 objections after the case has been, you know, in theory ready
03:39:36 20 for weeks, if not a month, and I understand your objection
21 about do you put your case on in the order that you want, but,
22 I mean, if there's a portion of your deposition which does not
23 have any objections that you want to put in to start to end the
24 day, I don't have any objection to that, and if not, if you
25 want to start a -- you know, if we get to that and you want to,

1 you know, just put the witness on whose got the least amount of
2 information that they're going to support.

3 Mr. Oppenheim?

4 MR. OPPENHEIM: My only point was, Your Honor, I
5 believe that the objections are currently ripe. This is the
6 first I've heard that now that it's already been reviewed by
7 one of Mr. Elkin's partners, that he now needs to look at it.
8 I think it's ripe for you.

9 THE COURT: Well, he's lead dog. He gets the
03:40:34 10 opportunity to do that.

11 MR. GOULD: May I just provide a bit more context,
12 Your Honor? We have the objections down to, I think, one
13 objection on plaintiffs' side and four, maybe five small, short
14 objections on the other side. They can be resolved very
15 quickly. There's no chance that video is going on today.
16 There's no way that Ms. Trickey is going to be finished today.

17 So we're prepared to move forward with it tomorrow,
18 but the order of witnesses --

19 THE COURT: Well, then this is a -- yeah. Okay.
03:41:00 20 Then this conversation -- I mean, you can put the deposition on
21 first thing in the morning if that's what you want to do, but,
22 I mean, my concern was if there were live witnesses here and we
23 were sitting in this courtroom without the jury, then that was
24 wasted time. Otherwise, you put the case in, and I'm sorry
25 those witnesses will be inconvenienced because they've been

1 here a little longer than they thought they would need to be.

2 All right. Let's take recess.

3 NOTE: At this point, a recess is taken; at the
4 conclusion of which the case continues in the absence of the
5 jury as follows:

6 JURY OUT

7 THE COURT: Why don't we talk about the demonstrative
8 issue after we let the jury go at five? Does that work?

9 MR. ELKIN: Oh, sure.

04:00:44 10 THE COURT: Yeah. That's more time to debate it then
11 and so we don't lose time with the jury.

12 MR. ELKIN: Sure.

13 THE COURT: Yeah, do you have something else?

14 MR. ELKIN: Yeah, just very, very briefly, Your
15 Honor. I just wanted to remind the Court about my request
16 yesterday regarding Ms. Trickey and the other Cox witnesses
17 since we're not going to recall them.

18 THE COURT: Right. Sure.

19 Okay. Joe, let's get the jury.

04:01:07 20 Do you have your next witness?

21 MR. OPPENHEIM: It's Ms. Trickey from Cox. I believe
22 she's in the hallway.

23 THE COURT: Okay.

24 THE COURT SECURITY OFFICER: Oh, are we ready?

25 THE COURT: Yes.

1 NOTE: At this point, the jury returns to the
2 courtroom; whereupon, the case continues as follows:

3 JURY IN

4 THE COURT: All right. Please have a seat.

5 Next witness?

6 MR. OPPENHEIM: Your Honor, the plaintiffs would call
7 Linda Trickey from Cox.

8 THE COURT: All right. Ladies and gentlemen,
9 Ms. Trickey is going to testify both as a witness for plaintiff
04:02:13 10 and as a witness for Cox at one time so that she doesn't have
11 to come back in Cox's case. All right?

12 All right. And as a result, there will be a direct,
13 a cross-examination, a redirect, and a recross examination to
14 give both parties the opportunity to examine her. All right,
15 thank you.

16 LINDA TRICKEY, PLAINTIFFS' WITNESS, SWORN

17 THE COURT: All right. Good afternoon. Please
18 proceed.

19 MR. OPPENHEIM: Is it all right if I --

04:03:10 20 THE COURT: Yes, sir.

21 DIRECT EXAMINATION

22 BY MR. OPPENHEIM:

23 Q. Good afternoon, Ms. Trickey. How are you?

24 A. Fine, thank you.

25 Q. Nice to see you again.

1 A. Thank you.

2 Q. You're currently employed by Cox, correct?

3 A. Yes.

4 Q. And you've been at Cox for roughly 17 years; is that
5 right?

6 A. Yes.

7 Q. And at one point in time, you were responsible for
8 providing legal counsel to the abuse group or the safety
9 department; is that right?

04:03:39 10 A. The customer safety team, yes.

11 Q. And at one point in time, that team was called the abuse
12 group; is that correct?

13 A. Yeah, many years ago.

14 Q. You're not a copyright lawyer, are you?

15 A. No.

16 Q. And in addition to providing counsel to the safety
17 department/abuse group, your duties include privacy and
18 security, correct?

19 A. At what point in time?

04:04:11 20 Q. At one point in time, they did?

21 A. No, no. I'm saying at what point in time are you
22 directing your question?

23 Q. Well, let me try it this way: At one point in time, you
24 provided counsel to Cox as a privacy and security lawyer,
25 correct?

1 A. Yes. So currently my title is assistant general counsel
2 of privacy and security.

3 Q. So on a day-to-day basis, you're not responsible for
4 handling intellectual property matters, correct?

5 A. No.

6 Q. And by intellectual property, you know that includes
7 copyright, correct?

8 A. Yes.

9 Q. Cox has a website, correct?

04:04:46 10 A. Yes.

11 Q. Cox.com or something like that?

12 A. Yes.

13 Q. And that website, like a lot of websites, has a section
14 that says "About," and you can pull down and see things about
15 Cox Communications, correct?

16 A. Yes.

17 Q. Let me ask you to -- there should be a binder up there for
18 you from us.

19 Did we put one up there for the witness? I apologize
04:05:12 20 if we didn't do it yet. We'll do it right now. Sorry.

21 A. Thank you.

22 Q. Could I ask you -- it's a large binder, my apologies for
23 that, and I'm going to ask you to turn all the way to the end,
24 to PX 451, if you would.

25 A. Okay.

1 Q. Do you see that document?

2 A. Yes.

3 Q. And that's a document that you can tell from the top came
4 from Cox.com, correct?

5 A. It appears to, yes.

6 MR. OPPENHEIM: Your Honor, we'd like to move Exhibit
7 PX 452 into -- excuse me -- 451 into evidence.

8 THE COURT: Any objection?

9 MR. ELKIN: No objection, Your Honor.

04:06:15 10 THE COURT: All right. It's received.

11 MR. OPPENHEIM: If we could maybe just zero in on the
12 top.

13 MR. OPPENHEIM:

14 Q. So this is a document at the very top, it says, "News
15 Room/About Us." Do you see that?

16 A. Yes.

17 Q. And it's a fact sheet, right, of some sort about Cox
18 Communications?

19 A. Yeah. It looks like something put out by our public
04:06:45 20 affairs department.

21 Q. Okay. And at the top, it says: Cox Communications is a
22 broadband communications and entertainment company. Correct?

23 A. Yes.

24 Q. And it says that it provides advanced digital video,
25 internet, telephone, home security, and automation services,

1 correct?

2 A. Yes.

3 Q. And then it goes on to say that Cox is the largest private
4 telecom company in the U.S., right?

5 A. Yes.

6 Q. And it says that Cox serves more than 6 million residences
7 and businesses, right?

8 A. Yes, that's what it says.

9 Q. And if we skip down to the company stats, about halfway
04:07:29 10 down, could you just read the first two bullets, please?

11 A. Cox has approximately 6 million total residential and
12 commercial customers. Total revenues of 11 billion in 2016.

13 Do you want me to read on?

14 Q. And then let's skip down to the fourth bullet point, if
15 you would.

16 A. Cox has approximately 20,000 employees nationwide.

17 Q. All right. And the next bullet point, if you could? I'm
18 sorry.

19 A. I'm sorry.

04:08:00 20 Q. Do you need some water up there?

21 A. No, no. I've just got the remnants of a cold still, so --

22 Q. My apologies.

23 A. Thank you.

24 Q. Could -- I'm sorry, could you read the bullet point that
25 starts with the word "Approximately"?

1 A. Approximately two-thirds of our customers are in a bundle,
2 approximately one-third of customers are triple play.

3 Q. And the term "bundle" refers to Cox customers who use two
4 or three different Cox services between television, telephone,
5 and internet, correct?

6 A. Yes.

7 Q. And if we could skip down to the second-to-the-last bullet
8 point, if you would?

9 A. Cox Communications is 55 years old and remains a wholly
04:08:48 10 owned subsidiary of Cox Enterprises, a privately held
11 family-owned corporation with 20 billion in annual revenues for
12 2016.

13 Q. So that -- do you understand that to mean that the
14 corporate entity Cox Communications is owned entirely by Cox
15 Enterprises?

16 A. Well, it says wholly owned subsidiary.

17 Q. So that's how you would understand it?

18 A. Yes, I believe so.

19 Q. And that Cox Enterprises is then privately held by a
04:09:18 20 family-owned corporation, is that correct?

21 A. Yes.

22 Q. And that Cox Enterprises has annual revenues in 2016 of
23 \$20 billion, is that correct?

24 A. That's what it says.

25 MR. OPPENHEIM: You can take that down, please,

1 Mr. Duval. Thank you.

2 MR. OPPENHEIM:

3 Q. I think you indicated earlier, but if I didn't elicit it,
4 you're a lawyer, correct?

5 A. Yes.

6 Q. And as a lawyer, you know what a lobbyist is, correct?

7 A. Yes.

8 Q. Would you agree that a lobbyist is somebody who petitions
9 the government?

04:10:01 10 A. I guess that could be one of the things that they do.

11 Q. Among others, right?

12 A. Yeah.

13 Q. And there's absolutely nothing wrong with being a
14 lobbyist, is there?

15 A. I guess I've never really thought about it, but no.

16 Q. You know, in fact, Cox engages in lobbying itself, right?

17 A. I actually am not familiar with the lobbying activities,
18 if any.

19 Q. Are you familiar -- do you, do you know whether or not Cox
04:10:32 20 has lobbyists?

21 A. I can assume. I mean, I know that we're a member of
22 different, you know, groups that relate to our services, but I
23 would presume there's lobbying involved.

24 Q. Would it surprise you if I told you that if I Googled
25 "Cox" and "lobbying," I found out that right now, that Cox is

1 trying to hire a senior manager of government and regulatory
2 affairs to do lobbying?

3 A. I don't know what you mean by surprising. It's very
4 possible.

5 Q. And would it surprise you that if I Googled to find out
6 about PACs that Cox had, that you would find that Cox operated
7 something called Cox Enterprises PAC that in 2014 paid federal
8 candidates over \$1.2 million? Would that surprise you?

9 A. Well, again, I'm not sure what you mean by surprising. I
04:11:30 10 think that's very possible, yes.

11 THE COURT: She said she's not involved in the
12 lobbying section, so, you know, you're asking her about
13 information that I've already indicated in previous days I
14 don't want you asking facts which aren't in evidence of which
15 the witness is unaware of. All right?

16 MR. OPPENHEIM: Can we call up PX 175?

17 MR. OPPENHEIM:

18 Q. And if you could look at that in your binder, please.

19 A. I'm sorry, 175?

04:12:15 20 Q. Yes, 175.

21 A. Okay. I think I'm there.

22 MR. OPPENHEIM: Any objection?

23 Hold on a moment.

24 THE COURT: Why don't you have --

25 MR. OPPENHEIM: Do you have another binder? I think

1 they're struggling with it. Were you able to get to it?

2 MR. ELKIN: No objection.

3 MR. OPPENHEIM: We'd move it into evidence, Your
4 Honor.

5 THE COURT: 175 is received.

6 BY MR. OPPENHEIM:

7 Q. Do you recognize this document, Ms. Trickey?

8 A. Yes.

9 Q. What is it?

04:13:08 10 A. This is the Cox High Speed Internet Acceptable Use Policy,
11 dated November 18, 2011.

12 Q. And at the beginning of this document, it says: CoxCom,
13 LLC, and its affiliates and/or distribution partners
14 (collectively "Cox") are pleased that you have chosen Cox High
15 Speed Internet service.

16 Do you see that?

17 A. Yes.

18 Q. And would the -- would the CoxCom -- excuse me.

19 Would the CoxCom, LLC, and its affiliates include Cox
04:14:03 20 Communications, Inc.?

21 A. You know, I'm not positive of the organizational
22 structure, but I believe CoxCom, LLC, is a subsidiary of Cox
23 Communications, Inc., I think.

24 Q. So Cox Communications would be affiliated as a subsidiary,
25 correct?

1 A. Yes, I believe so.

2 Q. And this AUP is the agreement that all high speed internet
3 subscribers to Cox must agree to, correct?

4 A. It's one of them.

5 Q. One of the agreements they must agree to.

6 A. Right.

7 Q. Okay. And in fact, if a subscriber is unwilling to agree
8 to this, they're not allowed to use the service; is that right?

04:14:54 9 A. Yes. I mean, they, they have to agree to it if they want
10 to use the service.

11 Q. So can we skip down to halfway through the first
12 paragraph, there's a sentence that begins with the word "All,"
13 and it may be easier to see on the screen.

14 A. Oh, okay.

15 Q. If that's easier for you. It's your choice.

16 A. Yes, I see that.

17 Q. Could you read that sentence and the next sentence,
18 please?

04:15:19 19 A. All users of the Service must abide by this AUP.
20 Violation of any term of this AUP may result in the immediate
21 suspension or termination of either your access to the Service
22 and/or your Cox account.

23 Q. And so by that, you understand it's a condition of use of
24 the service, correct?

25 A. To abide by the AUP.

1 Q. Yes.

2 A. Yes.

3 Q. And can you go to the first sentence of the next
4 paragraph, please? And could you read that?

5 A. By using the Service, you agree to abide by, and require
6 others using the Service via your account to abide by the terms
7 of this AUP.

8 Q. So this means that not only does the subscriber have to
9 agree to the AUP, but others using the service also have to
04:16:04 10 agree to it, correct?

11 A. Yes. They don't actually -- I mean, a family member
12 doesn't necessarily agree to the terms, but they are supposed
13 to abide by the terms.

14 Q. Correct. And then could you read the sentence in all caps
15 in that paragraph, please?

16 A. Beginning with "If"?

17 Q. Yes, please.

18 A. If you do not agree to be bound by these terms, you should
19 immediately stop the use of the services and notify the Cox
04:16:35 20 Customer Service Department so that your account may be closed.

21 Q. And by this, it means exactly what it says, that if a
22 subscriber is unwilling to agree to these, they should have
23 their account closed, correct?

24 A. Yeah, or stop use of the service.

25 Q. And then in the next paragraph, it lists prohibited

1 activities, correct?

2 A. Yes.

3 Q. And could you read the, the first sentence of prohibited
4 activities, please?

5 A. You may not use the Service in a manner that violates any
6 applicable local, state, federal, or international law, order
7 or regulation.

8 Q. All right. And let's turn to the page to No. 2, please.

9 And could you read the first sentence of No. 2, including the
10 title?

04:17:26

11 A. No. 2, Intellectual Property Infringement. You may not
12 use the Service to post, copy, transmit, or disseminate any
13 content that infringes the patents, copyrights, trade secrets,
14 trademark, moral rights, or propri- -- I think that's a typo --
15 proprietary rights of any party. Cox assumes no
16 responsibility, and you assume all risk regarding the
17 determination of whether material is in the public domain, or
18 may otherwise be used by you for such purposes.

19 Q. You would agree that paragraph 1 that we read on the first
20 page would prohibit using the service for copyright
21 infringement, correct, because that would be a violation of
22 federal law?

04:18:04

23 A. Yeah. I mean, reading it with Section 2 as well.

24 Q. And Section 2 essentially repeats that by saying you can't
25 commit copyright on the service, correct?

1 A. It's more specific.

2 Q. Right. Two different ways customers are told you cannot
3 commit copyright infringement on the network, correct?

4 A. Yes.

5 Q. And neither of these provisions have any exceptions to
6 them, correct?

7 A. No.

8 Q. Nothing in this agreement says it's okay to commit a
9 little bit of copyright infringement, right?

04:18:45 10 A. No.

11 Q. It says not allowed to commit any copyright infringement,
12 correct?

13 A. I mean, the document says what it says.

14 Q. Right. So --

15 A. Yeah.

16 Q. -- absolutely no copyright infringement, right?

17 Now, this document that we looked at was dated
18 November 18, 2011, correct?

19 A. Yes.

04:19:13 20 Q. Could we please --

21 A. Yes, yes.

22 Q. I'm sorry, I didn't mean to interrupt you.

23 Can you please turn to PX 184? Do you have that
24 there, Ms. Trickey?

25 A. Yes, I'm there.

1 Q. Now, do you recognize this document?

2 A. Yes.

3 Q. Is this an updated version of the Acceptable Use Policy?

4 A. Yes. This is the Acceptable Use Policy dated November 20,
5 2013.

6 MR. OPPENHEIM: Your Honor, we would offer --

7 MR. ELKIN: No objection, Your Honor.

8 THE COURT: All right. It's received.

9 BY MR. OPPENHEIM:

04:20:04 10 Q. And, Ms. Trickey, are you familiar with this Acceptable
11 Use Policy?

12 A. Yes.

13 Q. And would you agree that all of the provisions that we
14 just looked at in the 2011 policy remain in this 2013 policy?

15 A. Yes.

16 Q. And under this policy in 2013, it still prohibited all
17 infringement, correct?

18 A. Yes.

19 Q. It didn't allow a little bit. It prohibited it all
04:20:35 20 together, correct?

21 A. Yeah.

22 Q. If we could please look at PX 183. Do you have that in
23 front of you, Ms. Trickey?

24 A. Yes.

25 Q. And what is the title of that document?

1 A. "Cox Communications High-Speed Internet Training, Network
2 Security Procedures Participant's Guide."

3 MR. OPPENHEIM: Your offer -- Your Honor, we would
4 offer this.

5 MR. ELKIN: There's no foundation but we have no
6 objection.

7 THE COURT: All right. It's received.

8 BY MR. OPPENHEIM:

9 Q. Could you please turn to page 6 of this document? For
04:21:38 10 clarity sake, it's the document -- the page that says "The CHSI
11 Network Security Process" in the middle of the page. Do you
12 see that?

13 A. Yes.

14 Q. Okay. And so -- do you see at the very top left page, it
15 says: Let's look at two common Network Security violation
16 situations?

17 Do you see that at the very top?

18 A. I'm sorry, at the top of page 6?

19 Q. Yes.

04:22:09 20 A. Yes. I see it on here now.

21 Q. Okay. And do you see the first bullet point there? Could
22 you read that, please?

23 A. A CHSI customer is using file-sharing software to allow
24 other internet users to download MP3 files of copyrighted music
25 from his computer. This is clearly a case of Network Security

1 violation since he is allowing copyrighted -- excuse me --
2 copyright-protected materials to be shared, which is a
3 violation of federal law.

4 Q. Could we please turn to page 29? Do you see the bottom of
5 that page, where it says "DMCA Issues"?

6 A. Yes.

7 Q. Could you read the first, first sentence, please?

8 A. The Digital Millennium Copyright Act (DMCA) is a federal
9 law passed in 1998 that extends the copyright laws to digital
04:23:14 10 materials such as music, movies, and software.

11 Q. Okay. And then it goes on to say that under the AUP,
12 customers are not allowed to share, and then it lists movies,
13 games, music, and TV shows, right?

14 A. Yes.

15 Q. And this is consistent with the AUP, correct?

16 A. Yes.

17 MR. ELKIN: Objection, Your Honor. Witness
18 foundation. The document is in. There's been no foundation as
19 far as this witness is concerned.

04:23:48 20 THE COURT: Ask her whether she is involved in these
21 activities if you're going to ask her questions about the
22 document, Mr. Oppenheim.

23 MR. OPPENHEIM: Your Honor --

24 BY MR. OPPENHEIM:

25 Q. Well, let me ask you this: Ms. Trickey, you were

1 designated as a Cox witness on the issue of Cox's Acceptable
2 Use Policy, were you not?

3 A. Yes.

4 THE COURT: Okay. All right. Go ahead.

5 BY MR. OPPENHEIM:

6 Q. The next sentence, could you read that, please?

7 A. The AUP also does not allow the use of file sharing
8 programs used to make the above files available to the general
9 Internet.

04:24:30 10 Q. And then it goes on to say: Examples of the programs,
11 referring to file sharing, examples of file sharing programs
12 include BitTorrent, right?

13 A. Yes, that's an example.

14 Q. And Ares?

15 A. Yes.

16 Q. And another one called FrostWire, correct?

17 A. That's what it says.

18 Q. So under this document, this training document, it
19 indicates that the AUP does not allow subscribers to use

04:24:57 20 BitTorrent or Ares, correct?

21 A. No, I don't think it's saying that.

22 Q. I'm sorry, you're right. I misspoke. Under this, it says
23 that subscribers are not allowed to use those programs to share
24 movies, games, music, or TV shows, correct?

25 A. Right.

1 Q. And again, the document doesn't indicate that you're
2 allowed to commit a little bit of file sharing, correct?

3 A. It's silent on that topic.

4 Q. Well, it prohibits the use of file sharing to share music
5 altogether, correct?

6 A. Yes.

7 Q. In what years were you -- I'm sorry. Earlier -- you can
8 take that down, please, Mr. Duval.

9 Earlier you indicated that you did provide counsel to
04:26:07 10 the safety department or abuse group, correct?

11 A. Yeah, at one point in time.

12 Q. And what was that point in time?

13 A. So I would -- I was sort of tangentially involved because
14 I was the internet lawyer during the time period up until about
15 two thousand -- to the end of 2013, but when Mr. Cadenhead, who
16 was the attorney who primarily advised on at least the
17 copyright-type issues, he retired at the end of 2013, and so in
18 2014, I assumed responsibility for Cox's graduated response
19 process.

04:26:45 20 Q. So you were the internet lawyer for the company up until
21 2013, and then in 2014, you took on the abuse group or safety
22 department, correct?

23 A. Yeah. I mean, I did, I did work with the safety team
24 periodically on other types of issues relating to internet.

25 Q. And you obviously understood that the abuse group or

1 safety team had responsibility for implementing Cox's graduated
2 response policy, right?

3 A. Yes.

4 Q. Could you please turn to PX 193?

5 So this is an internal document on how to respond --
6 an internal Cox document, excuse me, on how to respond to
7 customers who have been suspended for copyright infringement,
8 correct?

9 MR. ELKIN: Objection. Foundation.

04:27:58 10 THE COURT: Yeah. Lay a --

11 MR. OPPENHEIM: That's what I'm doing.

12 THE COURT: Okay. Well, you're describing the
13 document in a fair amount of detail. Why don't you just ask
14 first do you recognize the document? What is it?

15 And go from there, please.

16 BY MR. OPPENHEIM:

17 Q. Ms. Trickey, is this a Q&A for Cox DMCA process?

18 A. Well, it says that at the top, but I don't believe I was
19 involved in the preparation of this document.

04:28:24 20 MR. OPPENHEIM: Your Honor, we'd move this into
21 evidence. It's a Cox-produced document. It's relevant to
22 their DMCA process.

23 MR. ELKIN: Objection, Your Honor. No foundation.

24 THE COURT: Well, does it have a date on it?

25 MR. OPPENHEIM: Your Honor, one moment.

1 THE COURT: What's the, what's the number of the
2 document? Plaintiffs' what?

3 MR. OPPENHEIM: I'm sorry, PX 193.

4 THE COURT: 193.

5 MR. GOULD: Your Honor, if it would be helpful, I've
6 got a smaller notebook for you.

7 THE COURT: I've got it. I'm looking at it. Thank
8 you.

9 I'll receive the document. It's within her field and
04:29:32 10 appears to be relevant to the time period. Go ahead. It's
11 received.

12 MR. OPPENHEIM: Could we bring that up, please,
13 Mr. Duval?

14 BY MR. OPPENHEIM:

15 Q. Ms. Trickey, this is an internal training document on how
16 to respond to customers who have been suspended for copyright
17 infringement, is it not?

18 A. I'm not sure. It says "Internal use only!" at the top, so
19 I assume it's an internal document.

04:30:09 20 Q. Ms. Trickey, you recall that you and I first met at your
21 deposition; isn't that correct?

22 A. Yes.

23 Q. And I took your deposition on April 15 of this year,
24 correct?

25 A. Yes.

1 Q. And when I took your deposition, you were sworn under
2 oath, correct?

3 A. Um-hum.

4 Q. And you answered questions that I asked you, correct?

5 A. Yes.

6 Q. And on page 297, line 2 of your deposition, did I not ask
7 you about this document?

8 Question: Do you know what it is?

9 Answer: It looks like an internal how to talk to
04:30:56 10 customers if they call in, you know. Once again, gosh, they
11 don't ever seem to label anything with the date, so I have no
12 idea if this is, unless there is some metadata that would help,
13 if this was something back in the early 2000s or the mid 2000s.
14 I don't see -- I don't recall seeing it.

15 But it's actually scripting out. So this would be
16 for some kind of care person who is going to be handling
17 customer calls. Thank you for calling us. Your access was or
18 is suspended due to a copyright infringement notice we received
19 from the copyright group.

04:31:31 20 Is that the question and answer that I posed to you
21 April of this year?

22 MR. ELKIN: Objection. There's no impeachment.

23 THE COURT: Overruled.

24 THE WITNESS: Okay. Well, thank you for reminding me
25 about that. So I guess this is the document we looked at. I

1 didn't recall. It didn't look familiar to me again, but I'll
2 do my best.

3 BY MR. OPPENHEIM:

4 Q. Thank you. That's all I can ask for.

5 And let's look at the, the first paragraph, please.
6 Could you read the first sentence -- the first two sentences,
7 please?

8 A. When speaking to a subscriber regarding an alleged DMCA
9 abuse issue, they may have questions about the infringement.

04:32:21 10 This document will help you in answering the most common
11 questions subscribers may have.

12 Q. Thank you.

13 And then could you read what's in bold that comes
14 next?

15 A. Please do not use the verbiage "three strikes" with our
16 customers.

17 Q. And then it goes on, does it not, to say Cox follows a
18 graduated warning process for escalating handling of
19 infringement claims, correct?

04:32:49 20 A. Yes.

21 Q. And then could we turn to the bottom of the page, where it
22 says, "If escalation"? Do you see that?

23 A. Um-hum, yes.

24 Q. Could you read that, please?

25 A. If escalation is needed, here is the section of the DMCA.

1 Q. And could you go ahead and read that? And I know it
2 continues into the next page.

3 A. Okay. In order for a service provider such as Cox to
4 limit its liability for copyright infringement on its network,
5 the service provider must have adopted and reasonably
6 implemented, and inform subscribers and accountholders of the
7 service provider's system or network of a policy that provides
8 for the termination in appropriate circumstances of subscribers
9 and accountholders of the service provider's system or network
04:33:36 10 who are repeat infringers.

11 Q. And the next sentence, could you read the part that says,
12 "What this means (in basic English)"?

13 A. What this means (in basic English) is that for Cox to not
14 be held liable for subscribers who infringe a copyright while
15 the material is transported through Cox's system, we must have
16 a policy that provides for termination of service in
17 appropriate circumstances for repeat infringers.

18 Q. And there are on the next couple pages some questions and
19 answers, correct?

04:34:34 20 A. I'm sorry, on that page?

21 Q. Well, it kind of --

22 A. It looks likes there's Q&A in here, yes.

23 Q. And you understand Q&A means questions and answers?

24 A. Yes.

25 Q. Okay. And, and -- and could you read the first Q&A,

1 please? I'm sorry, strike that.

2 The second one. I'm looking at the wrong section.
3 The one that -- well, let me ask -- I'll ask the question; you
4 read the answer. How about that?

5 Question: How many times can I do this until I lose
6 my service? (Terminate)

7 And what was the answer?

8 A. The answer says: This depends on the circumstances --

9 MR. ELKIN: Objection.

04:35:29 10 THE WITNESS: Sorry.

11 MR. ELKIN: This is misleading. May we have a
12 sidebar, please?

13 THE COURT: Yes.

14 NOTE: A sidebar discussion is had between the Court
15 and counsel out of the hearing of the jury as follows:

16 AT SIDEBAR

17 THE COURT: Yes, sir.

18 MR. ELKIN: As Your Honor well knows, as we've
19 previously discussed with the Court, we anticipated that there
04:36:04 20 would be some confusion with respect to whether Cox is liable
21 here because there's no ability to claim -- we knew we had to
22 with regard to the DMCA safe harbor.

23 He's reading this document. He's asking her to read
24 the document, which I get, but then he's just asked her a
25 question and then asking her what the answer is.

1 I think it's misleading because he's, he's creating
2 the impression she's answering something when all she's doing
3 is answering a question with respect to the ultimate question
4 of DMCA liability, and I just -- I think it's confusing and
5 misleading.

6 THE COURT: Well, you're just having her read the
7 exhibit, and obviously, I would think you would be using this
8 with Mr. Cadenhead or other people. I don't know whether they
9 were involved in other issues, but, you know, if you're just
04:36:58 10 going to have her read the question and answer just to show
11 that this was part of the document -- is that what your purpose
12 is?

13 MR. OPPENHEIM: So first, unfortunately,
14 Mr. Cadenhead is not going to join us at this party.

15 THE COURT: Right.

16 MR. OPPENHEIM: And so -- and this is the only Q&A
17 out of this document that I'm going to read, and I've asked her
18 to read the answer.

19 Simply admitting documents and not showing them to
04:37:23 20 the jury is not a useful thing, so there are certain provisions
21 of these documents that I want the jury to understand so they
22 have a full picture. I'm trying to do this without badgering
23 her, without pushing her, but these are Cox's own internal
24 documents.

25 THE COURT: I understand they are. I'm just trying

1 to understand why you were offering them. Are there other
2 follow-up questions, or you just wanted her to document the
3 fact that this was the policy in effect?

4 When is this controlling? What time frame?

5 MR. OPPENHEIM: Well, this document has no date --

6 THE COURT: I know.

7 MR. OPPENHEIM: -- but -- sorry, but I believe the
8 metadata indicates it's 2011.

9 MS. GOLINVEAUX: Correct.

04:38:00 10 MR. OPPENHEIM: And I can -- if you like, I can offer
11 that. I don't know if she'll know that.

12 THE COURT: Okay.

13 MR. OPPENHEIM: Or if you want to stipulate it, we'll
14 inform the jury of it.

15 THE COURT: All right. I'll let you do the Q&A for a
16 few more of these. I think it's certainly relevant, and the
17 document does speak for itself, but I'll let you highlight it
18 to the witness.

19 And your exception is noted.

04:38:17 20 MR. ELKIN: Thank you, Your Honor.

21 THE COURT: Yes, thank you.

22 NOTE: The sidebar discussion is concluded;
23 whereupon, the case continues before the jury as follows:

24 BEFORE THE JURY

25 THE COURT: All right. Please proceed.

1 BY MR. OPPENHEIM:

2 Q. Ms. Trickey, I'm going to -- we were on the page
3 labeled -- there are so many pages numbers here -- 002 on the
4 bottom, and I'm going to ask -- there's a question there that
5 says: How many times can I do this until I lose my service?
6 (Terminate)

7 Could you read the answer, please?

8 A. This depends on the circumstances, but we don't make any
9 particular number public. However, please keep in mind that
04:39:21 10 Cox does not want to have to terminate any customers, so we
11 work closely with our customers to avoid service interruption.

12 Q. So this document is an internal use only document; is that
13 correct?

14 A. It appears to be, yes.

15 Q. That provision or that Q&A doesn't say that if you
16 infringe, you'll be terminated, does it?

17 A. It says that you can be terminated.

18 Q. But it doesn't say you will be terminated, correct?

19 A. Well, it says it depends on the circumstances.

04:40:00 20 Q. And in fact, it says that Cox doesn't want to terminate
21 any of its customers, correct?

22 A. It says: We work closely with our customers to avoid
23 service interruption.

24 But then the next question says you can lose your
25 service permanently.

1 Q. Does it not say: However, please keep in mind that Cox
2 does not want to have to terminate any customers, correct?

3 A. Yes, it says that.

4 Q. Can we please turn to PX 203? Do you have that in front
5 of you, Ms. Trickey?

6 A. I do.

7 Q. At the very top of this document, it says "CATS." Is that
8 correct?

9 A. Yes.

04:41:29 10 Q. Do you know what CATS is?

11 MR. ELKIN: Objection. Is this in evidence?

12 MR. OPPENHEIM: Not yet. I'm laying a foundation.

13 MR. ELKIN: Objection.

14 THE COURT: Have her identify the document, please.
15 Go ahead. Go ahead.

16 BY MR. OPPENHEIM:

17 Q. What is -- what does the top of this document say it is?

18 A. It doesn't. I don't know what it does. It just says
19 "CATS," which I know what CATS means, but I don't know what the
04:41:53 20 rest of the document is.

21 Q. What does "CATS" mean?

22 A. CATS stands for the Cox Abuse Tracking System.

23 Q. And then it says: What is "Abuse?" Correct?

24 A. That's what it says.

25 Q. So this is a document about abuse and CATS, is it not?

1 A. Well, may I look at the whole document, please?

2 Q. Please do. Please do.

3 A. So it looks like an internal document used by the, the
4 abuse team.

5 MR. OPPENHEIM: Your Honor, we'd offer it in
6 evidence.

7 THE COURT: Any objection?

8 MR. ELKIN: We object, Your Honor. No foundation.

9 THE COURT: All right. It's received.

04:42:56 10 MR. OPPENHEIM: Can we just highlight the first two
11 paragraphs there, please, Mr. Duval?

12 BY MR. OPPENHEIM:

13 Q. I think earlier, Ms. Trickey, you said that you had
14 provided services to the safety department and that that was
15 also known as the abuse group at one point in time; is that
16 right?

17 A. Yes.

18 Q. And "abuse" is a term that Cox uses to refer to certain
19 violations of the AUP, is that correct, or the Acceptable Use
04:43:31 20 Policy?

21 A. Certain activities using the internet service.

22 Q. Including copyright infringement, correct?

23 A. Yes.

24 Q. Okay. And so here it says -- this document says: What is
25 "Abuse?" Correct?

1 A. Yes.

2 Q. And then it describes two common abuse situations; is that
3 correct?

4 A. That's what it says.

5 Q. And could you read the first of those two, please?

6 A. A CHSI customer is using file-sharing software to allow
7 other Internet users to download MP3 files of copyrighted music
8 from his computer. This is clearly a case of abuse since he is
9 allowing copyright-protected materials to be shared, which is a
04:44:17 10 violation of federal law.

11 Q. And --

12 A. Did you want me to read the second one, too?

13 Q. No, it's not necessary.

14 CHSI, what is that a reference to?

15 A. It's a short version of Cox high speed internet.

16 Q. And then in the fourth paragraph, it says: In both
17 cases -- so it's that scenario plus the next one -- the
18 customers will be warned or have their services suspended or
19 even their disconnected, in order to protect the CHSI network,
04:44:57 20 correct?

21 A. That's what it says.

22 Q. Okay. And then it lists as one of the types of abuse
23 copyright violations, correct?

24 A. Yes.

25 Q. Could you turn to the third page of this document, please?

1 And could you -- this paragraph refers to the abuse team. Is
2 that the same as the abuse group, do you think?

3 A. Yes, I think so.

4 Q. And then it says that that team regularly checks for newly
5 created abuse tickets. Do you see that?

6 A. That's what it says.

7 Q. And tickets are things that are in the CATS system; is
8 that correct?

9 A. Yes. So I guess you could say an activity using the
04:45:40 10 service could translate -- if it's an abuse activity, could
11 translate to a ticket.

12 Q. So if somebody reports an abuse violation, that may end
13 up -- and it's sent in to CATS, it may end up becoming a
14 ticket; is that correct?

15 A. Yes.

16 Q. So -- and that would include if a copyright owner sends an
17 infringement notice that goes to Cox, that could become a
18 ticket, correct?

19 A. Yes.

04:46:09 20 Q. So here it says that the abuse team regularly checks for
21 new tickets, right?

22 A. That's what it says.

23 Q. And that the abuse members review each ticket and research
24 prior complaints about the suspected abuser, correct?

25 A. That's what it says.

1 Q. And what -- and the reason -- excuse me, the reason that
2 the abuse team would do that research is to know whether that
3 suspected abuser had been the subject of a prior notice,
4 correct?

5 MR. ELKIN: Objection. Foundation.

6 THE COURT: Yes, sustained. I mean, ask her if she
7 has any personal familiarity with how this is applied in this
8 unit.

9 BY MR. OPPENHEIM:

04:46:55 10 Q. You understand that the abuse team reviews tickets that
11 are in the CATS system, correct?

12 A. Well, I'm a little confused at what point in time this is
13 because, you know, the CATS system was automated at some point
14 in time, so they wouldn't necessarily be reviewing each ticket.
15 So I'm not quite sure. If you could give me some more context
16 as to the time period, I might be able to assist.

17 Q. So -- but you understand that, that at one point in time
18 before the CATS system was fully automated, the abuse group
19 would review tickets that were in CATS, correct?

04:47:40 20 MR. ELKIN: Objection. Foundation.

21 THE WITNESS: You know, I guess it would --

22 THE COURT: Overruled.

23 THE WITNESS: I'm sorry. I guess it would depend on
24 what the abuse issue was. I don't -- I'm not sure.

25 THE COURT: Can you orient yourself in time based on

1 your position and experience at Cox as to when this step 2 was
2 in place?

3 THE WITNESS: No. I'm not actually sure because I'm
4 not exactly sure when the CATS system was, was automated to
5 handle tickets.

6 THE COURT: Okay. Thank you.

7 BY MR. OPPENHEIM:

8 Q. So you don't know the exact time frame, but you know that
9 at some point in time, CATS had a manual process, and then at
04:48:18 10 some point in time, it became more automated? Is that what
11 you're saying?

12 A. I think -- that sounds right, I think, yeah.

13 Q. And this document, you think, would have related to when
14 it was being operated manually; is that correct?

15 A. Well, again, I'm a little confused. I'm not sure because
16 there are other types of abuse issues, and so there could have
17 been some abuse issues that might have always been looked at
18 manually as opposed to automated. I'm not entirely positive.

19 THE COURT: All right. Let's move on.

04:48:46 20 BY MR. OPPENHEIM:

21 Q. Let's go down to the three bullet points in step 2,
22 please.

23 A. In step 2?

24 Q. Yes.

25 A. Okay.

1 Q. We're in step 2, please.

2 A. Yep.

3 Q. Look at those three bullet points, please.

4 And does this document describe a scenario where the
5 first offense indicates there would be an e-mail warning to the
6 customer; the second offense indicated that the customer's high
7 speed internet service would be suspended; and on the third
8 offense, the customer's high speed internet service would be
9 terminated?

04:49:29 10 A. That's what the document says, yes.

11 Q. And if we turn the page to the next page, at the bottom of
12 the page, there's a paragraph that says, "Termination of
13 Service: The '3-Strike' Rule."

14 Do you see that?

15 A. I see that.

16 Q. Could you just read the first two sentences of that
17 paragraph, please?

18 A. It is important to understand that suspensions and
19 terminations occur when a customer repeats the same type of
04:50:00 20 abuse. Cox has established a 3-Strike Rule for routine
21 abusers.

22 Q. So according -- strike that.

23 Let's now turn to PX 165, please.

24 A. I'm there.

25 Q. Faster than me apparently.

1 This is a copy of Cox's ticket handling procedures as
2 of September 18, 2008, correct?

3 A. That's what the document says.

4 MR. OPPENHEIM: Okay. We'd move this into evidence,
5 Your Honor.

6 MR. ELKIN: No objection, Your Honor.

7 THE COURT: It's received.

8 BY MR. OPPENHEIM:

9 Q. And this is -- can we just pull that up?

04:51:15 10 This is -- I just want to make sure we all understand
11 what this is because we're going to see a bunch of these
12 documents. It says on the top here "Abuse Department." That's
13 the same as the abuse group or the safety department, right?
14 Same thing?

15 A. Yes.

16 Q. Okay. Just the names are interchangeable?

17 A. Yes.

18 Q. Okay. And ticket handling procedures, this is a reference
19 to that this includes Cox's graduated response policy, correct?

04:51:43 20 A. This is the procedures for all handling of, I think, all
21 CATS tickets.

22 Q. And would that include the graduated response policy?

23 A. Yes.

24 Q. And maybe it includes other things beyond that?

25 A. Yes.

1 Q. Okay. And, and this particular document is the version
2 of -- includes the version of graduated response as of
3 September 18, 2008, correct?

4 A. Yes, I think so. What page do you want me to turn to?

5 Q. If we could turn to page 10 of 85.

6 A. Okay.

7 Q. The one labeled "Copyright."

8 A. Yes.

9 Q. And this is the document that lays out what the graduated
04:52:31 10 response policy for Cox was as of 2010 as it relates to
11 copyright infringement, correct?

12 A. I thought it said 2008 on the front.

13 Q. I'm sorry, you're right, 2008.

14 A. Yes.

15 Q. And let's actually go to the next page, which is
16 page 11 -- and actually, I apologize, at the bottom of page 10,
17 getting ahead of myself, in section 5.0, it says: Resolution -
18 First Offense.

19 Do you see that?

04:53:05 20 A. Yes.

21 Q. And if I look over on the right, it says: Warn Customer.
22 Correct?

23 A. Yes.

24 Q. So if Cox had the e-mail -- I'm sorry, I read that
25 backwards. On the left, it says if Cox has an e-mail address

1 for that subscriber, then Cox would warn the customer, right?

2 A. Yes.

3 Q. So what this is saying is if Cox gets a copyright
4 infringement notice from the copyright owner or one of their
5 representatives and it's the first notice with respect to a
6 particular user, Cox would e-mail the user a warning, right?

7 A. Yes. I think they would send them probably the complaint
8 along with some sort of information.

9 Q. They would forward the infringement notice?

04:53:48 10 A. Right. I think so, yeah.

11 Q. And then if we go to the next page, it describes what
12 happens for repeat infringers at the top, correct?

13 A. It -- if they got additional complaints.

14 Q. Okay. So if they get additional complaints here, what
15 happens on the first one of those additional complaints?

16 A. It says: Warn by e-mail.

17 Q. Okay. And then what happens on the second infringement
18 notice with respect to that subscriber?

19 A. Warn by e-mail.

04:54:24 20 Q. Okay. And what happens with the third infringement notice
21 with respect to that subscriber?

22 A. Warn by e-mail.

23 Q. And what happens with the fourth infringement notice?

24 A. They would send an e-mail warning.

25 Q. And the fifth?

1 A. Another e-mail warning.

2 Q. And the sixth?

3 A. A final e-mail warning.

4 Q. And do you know as you sit here if those e-mail warnings
5 looked any different each time?

6 A. I'm not aware if they were different or not.

7 Q. So after six -- after six, what happened -- on the seventh
8 notice that Cox got, seventh infringement notice with respect
9 to a particular subscriber, what happened?

04:55:16 10 A. Their service was suspended.

11 Q. Actually, let me go back to the warnings. Before we get
12 to the suspensions, let's go -- so there were six warning
13 e-mails, right?

14 A. Yes.

15 Q. Do you -- you don't know why the graduated response policy
16 changed from what it was to have six warnings, do you?

17 A. I'm sorry, changed from what?

18 Q. From what it was before 2008.

19 THE COURT: Do you believe that's the three-step?

04:55:45 20 THE WITNESS: Yeah, I'm not sure, what did we
21 establish before 2008?

22 THE COURT: Right.

23 THE WITNESS: I don't remember talking about a date
24 at all before 2008.

25 BY MR. OPPENHEIM:

1 Q. We just looked at a three-step policy, did we not?

2 A. Yeah, but I said I didn't know what -- when that was in
3 effect.

4 Q. Oh. Do you think the three-step policy came after this
5 ten-step policy?

6 A. I'm just not familiar with that policy.

7 Q. Okay. So do you know why there were six steps here?

8 A. Well, I mean, so, again, you know, as we've said in the
9 documents you've looked at, we tried to work with our
04:56:18 10 customers. So, of course, we are providing them opportunities
11 to see e-mails, and not everybody checks their e-mail all the
12 time, so this was an attempt to, you know, educate and inform
13 the customers.

14 Q. As you sit here today, do you know what the policy was
15 before September 18, 2008?

16 A. I'm not positive of what it was.

17 Q. And you don't know that it wasn't the three-step policy,
18 correct?

19 A. Right.

04:56:46 20 Q. It could have been, right?

21 A. I don't know what the policy was. I wasn't -- I wasn't
22 supporting this team at that point in time, not even in 2008.

23 Q. So you have six e-mail warnings -- actually, it's seven
24 because the first one is on the other page, right?

25 A. Okay.

1 Q. And then -- so now really it's the eighth infringement
2 notice. What happens?

3 A. So then their service was suspended.

4 Q. And it says tier 2. What does that mean?

5 A. So tier 2 would have been a group of persons that were
6 able to field calls that came in from subscribers whose service
7 had been suspended.

8 Q. So on the seventh -- or actually it's now we said the
9 eighth notice, because the first one is on the other page. At
04:57:31 10 the eighth infringement notice, the customer would have their
11 service temporarily suspended until they called in to speak
12 directly to a Cox representative; is that correct?

13 A. I believe that is what had to happen at this point in
14 time.

15 Q. Okay. And they could -- if they called in, they could get
16 their service restarted, correct, or un-suspended?

17 A. Well, the, the person that they spoke with would engage in
18 coaching and try to help them understand why this was occurring
19 and why they were getting these warnings. So they would walk
04:58:03 20 them through steps that they needed to take, and then they
21 would reinstate their service, reactivate.

22 Q. And the -- I'm sorry, I didn't mean to --

23 A. No. "Reactivate" is a better choice, not "reinstate."

24 Q. So after they're suspended, they get reactivated? That's
25 the term?

1 A. After the coaching and education.

2 Q. And then if there were a ninth notice, the same thing
3 would happen again?

4 A. Yes.

5 Q. And on the tenth notice, the same thing would happen, but
6 they had to call a different call center, right?

7 A. Yes. In that situation, they would be suspended to a
8 group called the TOC, which was, I think, the technical
9 operations center, which is a different group of people.

04:58:45 10 Q. A more sophisticated and smaller group that dealt with
11 these issues all the time, right?

12 A. I believe that's right, yes.

13 Q. And if there were 11 notices, at that point, Cox would
14 terminate the subscriber, correct?

15 A. It was a possibility of being terminated.

16 Q. So if the customer had been the subject of seven notices
17 that were warnings and three different suspension scenarios,
18 two where they called a regular representative and one where
19 they called this TOC group, it was only after all of that that
04:59:25 20 Cox would terminate the subscriber, correct?

21 A. Right. Well, they wanted to give the subscriber an
22 opportunity to either figure out, you know, how this was
23 occurring or modify behavior or, you know, coach and educate
24 them to get them -- the goal was to get them to change
25 behavior.

1 Q. And if you --

2 THE COURT: All right. Are you almost finished with
3 this?

4 MR. OPPENHEIM: I think I have two more -- five more
5 questions on this document, and then I'm done with this one.

6 THE COURT: Yeah, and then we'll break.

7 BY MR. OPPENHEIM:

8 Q. So could we just look at 7 below, please, and look at
9 item 3 in section 7? And doesn't that, Ms. Trickey, indicate
04:59:59 10 that if the DMCA complaints -- which you would agree is the
11 same as an infringement notice, right?

12 A. Yes.

13 Q. Okay. If the DM complaints continue after the third
14 suspension/final warning, the account is terminated with no
15 recourse to get their high speed internet service back,
16 correct?

17 A. That's what it says at that point in time.

18 Q. Okay. And -- so the termination was not optional
19 according to this document, correct?

05:00:28 20 A. That's what it says.

21 Q. One last thing before we break for the day. Go back up to
22 6. I just want to make sure I don't mislead anything here.
23 Under -- so section 1 is if Cox knew the e-mail address of
24 their subscriber, correct?

25 A. Right.

1 Q. In those scenarios where Cox didn't know the e-mail
2 address of their subscriber, there was a different process,
3 right?

4 A. Right.

5 Q. And that process, very quickly, was do nothing with the
6 first notice, right?

7 A. Right.

8 Q. Suspend on the next three notices, right?

9 A. Yes, that's what it says.

05:01:02 10 Q. And on the fifth notice, there would be a termination,
11 correct?

12 A. That's what it says.

13 MR. OPPENHEIM: Your Honor --

14 THE COURT: All right.

15 MR. OPPENHEIM: -- that may be more than five; I
16 apologize.

17 THE COURT: All right. Thank you.

18 All right. So as I indicated, I've got a docket
19 tomorrow morning. I'm going to start at 8:30 and hopefully --
05:01:21 20 I don't do a great job of predicting. I've got, I think, eight
21 or nine cases, but I think I'll be done so that we can resume
22 at 10:30. So I would ask you to come back at -- and be ready
23 to continue the testimony at 10:30 tomorrow morning.

24 And again, please don't do any research or
25 investigation or anything -- speak to anybody about the case,

1 and have a good evening. Thank you.

2 NOTE: At this point, the jury leaves the courtroom;
3 whereupon, the case continues as follows:

4 JURY OUT

5 THE COURT: All right. Have a seat.

6 Ms. Trickey, you're excused at this time. Please
7 don't discuss the testimony you've given so far with anyone
8 until you come back tomorrow. All right?

9 THE WITNESS: Yes, Your Honor.

05:02:26 10 THE COURT: All right. Have a good evening.

11 WITNESS STOOD DOWN

12 THE COURT: All right. Did you have a chance to talk
13 about demonstratives?

14 MR. ELKIN: Your Honor, we didn't, but I will say
15 that we -- I think there is a suggestion that we just simply
16 accept all of the demonstratives that were put in with
17 Dr. McCabe. We don't have a problem with that with one
18 exception, which is the, the one dealing with Tregillis, since
19 that subject matter wasn't covered.

05:03:10 20 THE COURT: Wasn't covered. Okay.

21 Any objection to that?

22 MR. OPPENHEIM: No, Your Honor.

23 THE COURT: All right. And, you know, discuss them
24 in an ongoing basis, but that one -- those will be received,
25 and if -- we'll need to mark them as a plaintiffs' exhibit

1 since it was your witness sponsoring them.

2 MR. OPPENHEIM: We'll mark them and move them in
3 tomorrow morning if -- that way we can create a record then
4 with a number.

5 THE COURT: Right. Thank you.

6 And you're going to work on the deposition
7 designations. Hopefully, there won't be -- and if you have a
8 debate, then I just need to see them by 8:00 so I can look at
9 what you're talking about.

05:03:58 10 MR. ELKIN: I'm advised by Mr. Gould that we're down
11 to the short strokes, so we'll try to get it done.

12 THE COURT: Okay. Let me know if you can't, and send
13 me the, the problems you still have.

14 Anything else we need to talk about tonight?

15 MR. GOULD: Your Honor, I think we're going to make
16 this pretty simple for you. With the limited designation
17 objections that remain, we have a marked copy of a transcript
18 for you that clearly marks the two spots where the plaintiffs
19 have objected to one thing and the defendants have objected to
05:04:29 20 one group of things.

21 THE COURT: Yeah. Mr. Elkin hasn't had a chance to
22 look at it, and he -- you know, I was the same way.

23 MR. ELKIN: I understand.

24 THE COURT: You know, he's one of the people who
25 knows all of the parts as they're working independently, and he

1 wants to make sure that somebody that doesn't fully understand
2 everything he's trying to do is -- he just wants to take a look
3 at it.

4 Is that right.

5 MR. GOULD: Understood.

6 THE COURT: Is that fair to say?

7 MR. ELKIN: Thank you, Your Honor. Exactly.

8 MR. GOULD: In terms of timing, Your Honor, would it
9 be -- I'm just trying to think constructively to get ahead of
05:05:08 10 the ball. Could we pop in for five minutes in the morning to
11 present materials to you so you can consider them? We can get
12 some guidance from you by the time we return at 10:30. We can
13 cut the video while Ms. Trickey is testifying and be ready to
14 go.

15 THE COURT: Yeah, absolutely. Or if you're going to
16 take a look at them now before you leave, it's only 5:00, I'm
17 happy to look at them. I'll be here for quite a while.

18 So if you want to just sit down and see whether you
19 can work them out, if you can't, then Joe will hang around --
05:05:42 20 or somebody will be here, one of the law clerks will be here,
21 and just let them know where the problems continue, and I'll
22 get you out a decision right away.

23 MR. GOULD: Thank you, Your Honor.

24 THE COURT: Okay. All right. Thank you-all. We're
25 in recess.

1 NOTE: At this point, the December 5, 2019, portion
2 of the case is concluded.

3
4
5 CERTIFICATE OF COURT REPORTERS
6

7
8 We certify that the foregoing is a true and
9 accurate transcription of our stenographic notes.

10
11 /s/ Norman B. Linnell
12 Norman B. Linnell, RPR, CM, VCE, FCRR

13
14 /s/ Anneliese J. Thomson
15 Anneliese J. Thomson, RDR, CRR
16
17
18
19
20
21
22
23
24
25